Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, *et al.*

Petitioners,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the National Security Council (NSC) an "agency" under the Federal Records Act?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Scott Armstrong, the National Security Archive, the American Historical Association, the American Library Association, the Center for National Security Studies, and Eddie Becker. Petitioners were plaintiffs and appellees in the proceedings below.

Appellants-defendants in the proceedings below were the Executive Office of the President, the Office of Administration, the National Security Council, the White House Communications Agency, and the Acting Archivist of the United States, sued in her official capacity.

Prior to the judgment that petitioners ask this Court to review, former Senator Gaylord Nelson and Gary Stern were plaintiffs in the proceedings below, and former Presidents Ronald Reagan and George M. Bush were defendants. These parties were dismissed prior to the judgment that petitioners ask this Court to review.

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OPINIONS BELOW

The opinion of the District Court holding that the National Security Council is an "agency" is reported at 877 F. Supp. 690 (D.D.C. 1995) and is reprinted in the Appendix to this petition at pages A52-A86. This ruling was reversed by a divided panel of the Court of Appeals for the District of Columbia Circuit, in an opinion reported at 90 F.3d 553 (D.C. Cir. 1996), and reprinted in the Appendix at pages A1-A51.

JURISDICTION

The Court of Appeals denied petitioners' timely petition for rehearing and suggestion for rehearing *in banc* in an unreported order dated November 6, 1996. *See* Appendix A106-07. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The definitions section of the Federal Records Act, 44 U.S.C. 2901, as amended, provides:

> As used in this chapter, and chapters 21, 25, 31, and 33 of this title -
>
> * * * * *
>
> (13) the term "executive agency" shall have the meaning given such term by section 3(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(a));
>
> (14) the term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Supreme Court, the Senate, the House of Representatives, and the Architect of the Capitol and

any activities under the direction of the Architect of the Capitol).

Section 3(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 472(a)), provides:

> (a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

The Freedom of Information Act, 5 U.S.C. § 552(f), provides that:

> (f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The definitions section of the Administrative Procedure Act, 5 U.S.C. § 551, provides:

> For the purpose of this subchapter -
>
> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia;

* * *

Sections 101 and 103 of the National Security Act of 1947, and selected executive orders and regulations concerning the National Security Council, are set forth in the Appendix beginning at A108.

STATEMENT OF THE CASE

This action concerns the application to the highest offices in the Executive Branch of the laws designed to prevent destruction of government records. In the statutes governing preservation and access to federal agency records, Congress has defined "agency" broadly to encompass "any executive department" or "other establishment" in the Executive Branch. 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a); 5 U.S.C. § 552(f). The Executive Office of the President (EOP) is an agency subject to these laws, but a limited exception, based on legislative history, has been recognized for "'the President's immediate personal staff or units in the Executive Office [of the President] whose *sole function* is to advise and assist the President.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 1380, 93rd Cong., 2d Sess. 15 (1974)) (italics added).

In *Kissinger*, this Court concluded that the National Security Council (NSC) is not covered by this "sole function" exception, but is an agency subject to the Freedom of Information Act (FOIA). Indeed, from 1974 through 1993, it was universally acknowledged by Congress and within the Executive Branch that the NSC is an "agency" because it does not *solely* advise and assist the President, but exercises authority over a host of important national security issues, such as intelligence operations and emergency preparedness.

In March, 1994, however, in order to avoid judicial review of its records destruction practices, the NSC reversed its position and declared that it was not an "agency," and, therefore, not subject to the Federal Records Act, the statute regulating destruction of agency records. The district court rejected the NSC's claim, but a divided panel of the District of Columbia Circuit reversed and held that the NSC is entirely exempt from the Federal Records Act and the FOIA.

The majority relied on *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), in which a divided panel held that the determination of whether an EOP entity falls within the "sole function" exception requires application of a three-factor test that did not appear in the legislative history or in any prior court decision. Judge Tatel dissented because he believed that the majority's interpretation of *Meyer* "strayed from Congress's commands," Appendix at A42-43, and would exempt EOP units "engaging in just the sort of official activity that the Federal Records Act and FOIA were designed to bring into public view." *Id.* at A29-31.

A. *Statutory Background*

The EOP encompasses a number of Executive Branch entities that report directly to the President and share common administrative services. *See* 5 U.S.C. App., Reorganization Plan No. 1 of 1939, 53 Stat. 1423. The units within the EOP include the White House Office, the Office of Management and Budget, the Office of the United States Trade Representative, the Office of Science and Technology Policy, and the NSC. *See* 3 C.F.R. § 100.735-2(a) (1995); United States Government Manual 1996/97 at 90-107.

In *Kissinger*, this Court recognized that the EOP is an "agency" subject to the laws governing preservation of, and access to, records of federal agencies. 445 U.S. at 156. The Federal Records Act, which governs preservation of agency records, defines "agency" as "any executive department or independent establishment in the executive branch of the Government." 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a). The FOIA was amended by Congress in 1974 to define agency as "any executive department . . . or other establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f).

However, in *Kissinger*, based on legislative history, this Court endorsed a limited exception to the specific statutory inclusion of the Executive Office of the President. 445 U.S. at 156. The exemption arises from the Conference Report for the 1974 FOIA Amendments, which states that:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David*, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

H.R. Conf. Rep. No. 1380, 93rd Cong., 2d Sess. 15 (1974). In 1978, Congress endorsed *Soucie* once again as the appropriate test for determining which EOP units are "agencies" when it adopted the Presidential Records Act (PRA) to govern preservation and access to records that are not subject to the Federal Records Act or FOIA. *See* H.R. Rep. No. 1487, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5742; *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1295 (D.C.

Cir. 1993) ("[t]he legislative history of the PRA could not be clearer in indicating congressional intent to adopt the test articulated in *Soucie* to determine what entities are 'agencies' subject to the FOIA"). Accordingly, the FRA and FOIA govern the records of "agencies," and the PRA governs records of entities that are not subject to those statutes because they fall within the exemption recognized in *Kissinger* for records of the President's immediate personal staff or units in the EOP whose sole function is to advise and assist the President. *See* 44 U.S.C. § 2201(2); *Armstrong v. EOP*, 1 F.3d at 1292.

The issue of whether an entity is an "agency" subject to the FRA and FOIA, or subject only to the PRA, is critical for several reasons. ***First***, although both the FRA and the PRA mandate the preservation of records, the remedies available to prevent improper destruction have been held to be significantly greater under the FRA. In 1991, the District of Columbia Circuit ruled that, although agency compliance with the FRA is subject to judicial review and enforcement, compliance with the PRA during the President's term of office is not subject to judicial review. *Armstrong v. Bush*, 924 F.2d 282, 290-91 (D.C. Cir. 1991).

Second, the Archivist has a duty to take action to prevent the improper removal or destruction of agency records under the FRA, *id.* at 295-96, but the Archivist has no ability or duty to take action against improper destruction of Presidential records by EOP entities subject to the PRA. *Armstrong v. EOP*, 1 F.3d at 1291 ("[n]either the Archivist nor an agency head can initiate any action . . . to effect the recovery or ensure the preservation of presidential records."); Appendix at A4.

Finally, records subject to the PRA are not subject to disclosure under FOIA during the President's term of office, but only become available for release under the

FOIA approximately five to twelve years after the President leaves office. *See* 44 U.S.C. § 2204(c)(1); *Armstrong v. EOP*, 1 F.3d at 1291; *American Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1308 (D.D.C. 1995).

From the amendment of FOIA in 1974 through 1993, it was uniformly acknowledged that the NSC was an "agency" subject to the FOIA. When Congress adopted the *Soucie* test in 1974, it plainly considered the NSC to be an "agency." The report of the House committee that drafted the 1974 amendment to the definition of "agency" in the FOIA states that the Committee intended that the amended include "such functional entities as ... the National Security Council." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. This Court cited this House Report as "indicating that the National Security Council is an executive agency to which the FOIA applies." *Kissinger*, 445 U.S. at 156. During the hearings leading up to the 1978 PRA, Congress obtained an opinion from congressional researchers concluding that the NSC is an agency.[1]

The Executive Branch also agreed that the NSC is an agency under *Soucie*. After the 1974 amendments to the FOIA, the NSC issued regulations as an agency under the FOIA and the Privacy Act. *See* 40 Fed. Reg. 7316 (1975); 40 Fed. Reg. 47746 (1975). Under FOIA's requirement that "each agency" submit an annual report to

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[1] *See* Appendix at A43 (quoting LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, APPLICABILITY OF THE FREEDOM OF INFORMATION ACT TO THE EXECUTIVE OFFICE OF THE PRESIDENT 8 (1978), *reprinted in Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the House Comm. on Gov't Operations*, 95th Cong., 2d Sess. 759, 766 (1978)).

Congress on its FOIA activities, 5 U.S.C. § 552(e), the NSC submitted reports each year describing thousands of FOIA determinations made by the NSC staff. Shortly before President Carter signed the PRA, the Office of Legal Counsel advised the President that the NSC is an agency under the Administrative Procedure Act (APA) and the FOIA. 2 Op. Off. Legal Counsel 197, 205 (1978), *withdrawn,* Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Office of Legal Counsel, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor, Nat'l Sec. Council (Sept. 20, 1993).

In litigation, the courts, including this Court in *Kissinger*, considered the NSC an agency under *Soucie*, and the government never disputed that NSC decisions were subject to judicial review under the APA and the FOIA. *See Kissinger*, 445 U.S. at 146, 156-57 (circuit court and this Court state that the NSC is an agency subject to FOIA); *Armstrong v. EOP*, 1 F.3d at 1296 ("NSC appears to have routinely conceded its status as an 'agency' subject to the FOIA.").

The NSC concluded that it was an agency because, in its own words, it serves a "dual role" in which it both advises and assists the President and performs "independent functions set forth in the governing statute, as well as in regulations and Executive Orders." Appendix at A22; *see also id.* at A96 (May 8, 1993 Memorandum to NSC Staff; "the NSC both advises and assists the President and is an agency."). This dual role was reflected in the NSC's practice of maintaining separate files for "presidential" records and federal records. The NSC instructed staff to classify records as federal records if they were "'received or created in connection with the work of the statutorily-created [NSC],'" and as presidential records if created for the President and his advisors "'independent of any meeting or policy and staff

actions of the NSC or its various groups.'" *See Armstrong v. EOP*, 1 F.3d at 1291, 1296 (quoting EOP regulations); *see also* Appendix at A98 & n.1 (instructions on separating presidential and federal records at NSC).

Moreover, until March 1994, the NSC and the Archivist treated records concerning the NSC's interagency processes as agency records subject to the Federal Records Act. Under the FRA, an "agency" must submit schedules describing the disposition of its records, and it must transfer historically valuable agency records to the Archivist when they are no longer needed by the agency. 44 U.S.C. §§ 2107, 3303. NSC records dating back to the Truman and Eisenhower administrations were transferred to the Archivist as agency records under the Federal Records Act. As recently as 1990, the NSC submitted records schedules to the Archivist for transfer of Reagan and Bush administration records as "agency" records subject to the FRA. *See* 36 C.F.R. § 1228.26-30 (1996).

B. *Proceedings Below.*

This action was brought by historians, researchers, journalists and librarians to prevent the destruction of historically valuable records created by the NSC and other EOP components on their electronic mail systems. *See Armstrong v. EOP*, 1 F.3d at 1280. At the close of the Reagan Administration in January 1989, the NSC and EOP were planning to erase the information stored on their electronic mail systems, despite the historical importance of these records to an understanding of the Iran-Contra Affair and other activities of the Reagan Administration. *Id.* at 1283 n.7 (discussing substantive importance of the records). At plaintiffs' request, the district court entered a temporary restraining order

prohibiting destruction of these records, and the government subsequently agreed to preserve computer tapes containing the records in dispute. *Armstrong v. Bush*, 721 F. Supp. 343, 347-48 & n.9 (D.D.C. 1989). In November 1992, a second temporary restraining order was entered to prevent destruction of similar records created during the Bush Administration by the EOP and the NSC. *See Armstrong v. Bush*, 807 F.Supp. 816, 820-23 (D.D.C. 1992). The government has acknowledged that, but for the district court's intervention, many of the electronic records on the NSC and EOP systems would not have been retained.

In two separate interlocutory appeals, the District of Columbia Circuit Court held that (1) judicial review is available to determine whether the records preservation guidelines of the EOP and NSC comply with the FRA, but not the PRA, *Armstrong v. Bush*, 924 F.2d at 291-97; (2) the EOP's and the NSC's recordkeeping guidelines violated the FRA, *Armstrong v. EOP*, 1 F.3d at 1282-88; and (3) agency guidelines for distinguishing federal and presidential records are subject to judicial review to ensure that the agency is not evading its obligations under the FRA. *Id.* at 1292-94. This third ruling was necessary because both the NSC and the Office of Science and Technology Policy (OSTP) had issued guidelines that classified some of their records as "presidential," and the case was remanded to allow the district court to determine whether these guidelines were consistent with *Soucie*. *Id.* at 1296-97. Throughout these proceedings during the first five years of this litigation, the NSC conceded that it was an "agency."[2]

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[2] Indeed, in 1992, in response to Requests for Admissions under Fed. R. Civ. P. 36, the NSC characterized some of its functions as "agency" functions and asserted that it was subject to both the FRA

On remand, the NSC did not defend its guidelines classifying some records as presidential and others as federal, but declared, for the first time in this or any other litigation, that it is not an agency.[3] At the NSC's urging, the Office of Legal Counsel withdrew its 1978 opinion that the NSC is an "agency," and, on March 24, 1994, the NSC announced that, because it was not an agency, it no longer considered itself subject to the records preservation requirements of the FRA or the disclosure requirements of the FOIA. Appendix at A91.

The district court rejected the NSC's novel claim as "contrary to history, past practice and the law," and directed the NSC and the Archivist to issue recordkeeping guidelines "to ensure that non-Presidential records are preserved under the FRA and are not destroyed under the guise of the Presidential Records Act." *Id.* at A57, A85. Based on an extensive stipulated record, the district court found that the NSC was an agency under *Soucie* because it performs traditional agency functions, including rulemaking and adjudication. *Id.* at A72-76. By statute, the NSC is responsible for directing the Central Intelligence Agency ("CIA"), *id.* at A74, and the President has issued various executive orders and presidential directives delegating specific authority over intelligence activities, protection of classified national security information, telecommunications, emergency preparedness, nonproliferation of nuclear weapons, and public diplomacy to the NSC. *Id.* at A74-76. The district court also found that the fact that "the NSC has admitted to being, and has operated as, an agency prior to" its change of position in

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and the FOIA. Appendix at A63 n.9.

[3] OSTP abandoned its prior guidelines and acknowledged that all of its records were subject to the FRA.

this litigation, reinforced the conclusion that it is an agency. *Id.* at A82-83.

On appeal, a divided panel of the Court of Appeals reversed. The majority did not address this Court's conclusion in *Kissinger* that the NSC was an agency. It dismissed the NSC's prior descriptions of its dual functions and the NSC's prior, repeated acknowledgements that it was an agency as "not probative on the question" of whether the NSC is indeed an agency. *Id.* at A22-23. The majority also dismissed the legislative history indicating that Congress concluded that the NSC was an agency on the ground that, by adopting the judicially-created test announced in *Soucie*, Congress "handed the matter back to the courts, anticipating that we would continue to shape and refine the basic *Soucie* definition." *Id.* at A24-25. The original *Soucie* definition, according to the majority, was re-shaped by the D.C. Circuit in *Meyer v. Bush*, when a divided panel ruled that whether an entity is an agency depended on three factors: "(1) 'how close operationally the group is to the President,' (2) 'whether it has a self-contained structure,' and (3) 'the nature of its delegat[ed]' authority." *Id.* at A8 (quoting *Meyer*, 981 F.2d at 1293). This formulation of the test does not appear in *Soucie*, the legislative history or any decisions prior to *Meyer*. 981 F.2d at 1312 (Wald, J., dissenting) (criticizing first two factors as "entirely creatures of the majority's own making").

Applying the *Meyer* factors to the NSC, the majority agreed with the district court that the NSC had a sufficiently self-contained structure to be an agency. The NSC has a separate budget and more than 150 professional employees, "organized into a complex system of committees and working groups reporting ultimately to the Executive Secretary" of the NSC, and "separate offices, each responsible for a particular geographic region

or functional area, with clearly established lines of authority both among and within offices." Appendix at A11. The majority also agreed that the NSC staff has authority to review requests for document declassification and apparent authority to decide appeals on classification issues. It also acknowledged that the President has delegated oversight and coordination functions to the NSC in a number of areas, including emergency telecommunications, nuclear non-proliferation and public diplomacy. *Id.* at A21.

However, the majority concluded that these functions and delegations were not sufficient under *Meyer* because the President's role as chairman of the NSC is an "overwhelming fact." *Id.* Although the NSC has a separate legal and structural identity, the majority believed that this was "not sufficient to overweigh the significance of the close proximity — indeed the essential identity — between the statutory Council and the President." *Id.*

The majority also insisted that the NSC cannot be deemed an agency unless it is shown that the authority delegated to the NSC was exercised "without direct supervision by the President." *Id.* Thus, although the NSC has authority over emergency telecommunications functions that can bind even non-governmental telecommunications common carriers and users, the majority found this authority to be irrelevant because there was no proof that it could be exercised "without the consent of the President or his [National Security Advisor.]" *Id.* at A17.

Judge Tatel dissented, saying that he feared that the majority had allowed the sole function exception under the federal records laws to swallow the rule. *Id.* at A29. According to Judge Tatel, the "'sole function' exception excludes only a small subset of entities within the Executive Office of the President that do not themselves

'do' anything apart from advising the President and assisting him in what he does." *Id.* at A30. However, under the majority's approach it appeared that no EOP unit could be an agency. *Id.* at A36, A41.

The majority's overwhelming emphasis on the NSC's proximity to the President was misplaced, Judge Tatel argued, because the "less proximate NSC staff and numerous NSC interagency groups" exercised independent functions. *Id.* at A28. Moreover, "[e]ven with the President as a member, the NSC is a legal entity distinct from the President, and the record indicates that responsibilities delegated to the NSC are in fact carried out without the personal involvement of the President." *Id.* The majority's insistence on proof that the NSC "may act without the consent of the President" was also misplaced. The record showed that the NSC has "the authority to act without first seeking the President's consent." *Id.* at A36. The majority's suggestion that such authority is not sufficient and that agency status requires proof that an entity is able to "exercise its authority even over the objection of the President," creates an "impossible hurdle" that no EOP unit could satisfy. *Id.* at A35-36; *see also id.* at A29-31.

Finally, Judge Tatel observed that, because the only basis for exempting the NSC from the federal records laws "is a limited exception derived from the legislative history of FOIA," the court should be careful not to stray from Congress' command when applying *Meyer*. *Id.* at A42. The historical record showed that "the framers of the Federal Records Act, FOIA, and the Presidential Records Act would be quite surprised to learn from the court's opinion that the Federal Records Act does not

cover and FOIA does not guarantee citizens access to nonsensitive NSC documents." *Id.*[4]

Petitioners' timely application for *en banc* review was denied on November 6, 1996.

SUMMARY OF REASONS FOR GRANTING THE WRIT

After decades in which Congress, this Court, and even the NSC itself recognized that the NSC was an agency, the Circuit Court for the District of Columbia has ruled to the contrary in an unprecedented decision that exempts the NSC from the federal records preservation and disclosure laws. Both the legal interpretation underlying this ruling, and its specific effect on the NSC, present important issues of federal law that warrant review by this Court.

1. In *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980), this Court recognized that the Executive Office of the President is an "agency" under the federal records statutes but allowed a limited exemption for EOP units whose sole function is to advise and assist the President. The District of Columbia Circuit's rulings in the decision below and in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), have not been faithful to *Kissinger*, but have expanded and distorted the

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[4] In fact, members of Congress have subsequently criticized the decision below as contrary to Congress' intent and the historical understanding of the statutes. *See* 142 Cong. Rec. H10451 (Sept. 17, 1996) (Rep. Maloney) (D.C. Circuit's decision is "contrary to 20 years of freedom of information practice and contrary to the way Congress has treated the National Security Council in other legislation"); *Id.* at S10716 (Sen. Leahy) (D.C. Circuit ruled that the NSC is not an agency "despite the fact that the NSC has complied with FOIA for years under both Republican and Democratic Presidents.")

limited "sole function" exception in a manner that is contrary to Congress' express mandate that the agencies covered by the FOIA include "the Executive Office of the President." 5 U.S.C. § 552(f). The conflict between the limited exception that this Court endorsed in *Kissinger* and the decision below presents an important issue of federal law that should be settled by this Court.

The Circuit Court's departure from the test endorsed in *Kissinger* is demonstrated by the fact that this Court considered the NSC to be an agency in that case, and both Congress and the Executive Branch concurred that the NSC was an agency because of the substantial authority it wields. The Circuit Court's new approach also cannot be reconciled with the result in *Soucie v. David*, the decision on which this limited exception is founded. Moreover, the ruling below not only removes the NSC from the federal records laws, but calls into question the status of other EOP units that have always been considered agencies under the federal records statutes.

2. The Circuit Court's specific holding that the NSC is not an agency also should be reviewed by this Court because of its profound effect on the management of vital government records held by the NSC. Because of the NSC's role in formulating and implementing critical national security decisions, the NSC creates and holds an enormous volume of historically important records. The importance of the NSC's records, and the risk of improper destruction, are evident from the documents at issue in this case, many of which provided critical evidence concerning the Iran-Contra Affair. However, under the Circuit Court's rulings, the NSC's records preservation practices are immune from judicial review, and the remedies provided for unlawful destruction and removal of agency records do not apply to the NSC. The Circuit Court's decision to exempt the NSC from the federal

records preservation and disclosure laws creates a significant gap in the statutes preserving historically important government records and should not be permitted to stand without review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, BY EXPANDING THE LIMITED EXCEPTION TO THE DEFINITION OF AGENCY RECOGNIZED IN THIS COURT'S DECISION IN *KISSINGER*, DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD REVIEW.

Dissenting in *Meyer v. Bush*, Judge Wald warned that the majority's revision of the "sole function" test in that case "clearly maps out the formula for getting around disclosure laws in the Executive Office of the President." 981 F.2d at 1315. The extension of *Meyer* in the decision below goes even further by reshaping the law so that the limited exemption recognized by this Court in *Kissinger* extends to even the most firmly established and powerful EOP units, such as the NSC. This result is incompatible with the statutory mandate that the EOP be considered an agency, fundamentally alters the standard that Congress adopted, and creates a gaping loophole in the records laws.

The statutory definitions of agency in the FRA and FOIA are cast in broad terms to cover "any executive department," and there is no exception for units of the EOP. 44 U.S.C. § 2901(13); 40 U.S.C. § 472(a). Indeed, the FOIA explicitly identifies the Executive Office of the President as an agency. 5 U.S.C. § 552(f). The exception recognized by this Court in *Kissinger* for units "whose sole function is to advise and assist the President," is very

limited, and is based only on the legislative history indicating that Congress adopted the result in *Soucie*. H.R. Conf. Rep. No. 1380, *supra*, page 5, at 15.

When Congress enacts legislation that adopts a judicial interpretation in this manner, the courts are bound to apply it, and may not alter or reshape it. *See United States v. Board of Commissioners*, 435 U.S. 110, 134-35 (1978). The District of Columbia Circuit's recent decisions on the definition of "agency," however, have violated this principle by fundamentally altering the test that Congress endorsed. Specifically, the Circuit's decision in *Meyer* and the ruling below impose two requirements that are simply incompatible with the *Kissinger* standard, and potentially exempt any EOP unit from the records laws.

First, the majority insisted that an EOP entity is an agency only if it has the authority to act contrary to the President's wishes. Executive orders, presidential directives, and regulations all delegate authority to the NSC, its committees or its staff to act in specific areas without further action by the President.[5] Nonetheless, the ruling below holds that such authority is not sufficient unless it is exercised "without direct supervision by the President," or "without the consent of the President." Appendix at A17, A21. The NSC, however, is no different from other EOP entities and agencies exercising delegated authority from the President. Every EOP unit and Cabinet Department is subject to the President's

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[5] *See, e.g.*, Appendix at A116-31, Exec. Order No. 12,472, §§ 2(a)(1), 2(c)(4) (1984); Exec. Order No. 12,656, §§ 101(a), 104 (1988); Exec. Ord. 12,829 §§ 102(a), (b) (1993); Exec. Order No. 12,919, § 104(a) (1995); 32 C.F.R. § 2101.41 (1996); 32 C.F.R. § 2003.20(k) (1996); 47 C.F.R. § 201.4(a) (1995); 47 C.F.R. § 211.6(g) (1995); 47 C.F.R. §§ 213.0(b), 213.7(f),(g) (1995).

direction and cannot act "independently" from the President in the sense that they have no authority to disregard the President's policies. Under the majority's approach, "virtually no loyal government body would be sufficiently 'independent' to qualify as an agency. Only renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'" *Meyer*, 981 F.2d at 1309 (Wald, J., dissenting).

Second, the ruling below gives overwhelming weight to the proximity of an EOP unit to the President. See Appendix at A11-12, A21. All EOP units have proximity to the President, but such proximity only indicates that application of the "sole function" test is necessary. The ruling below, however, allows the proximity of EOP units to the President to overshadow the question of whether a particular EOP unit has authority to do more than "advise and assist" the President. "[B]y the majority's broad definition of 'proximity,' virtually every person or entity within the Executive Office of the President would be excluded from the FOIA, contrary to the statute's express inclusion of the Executive Office of the President in its definition of agency." *Meyer*, 981 F.2d at 1310 (Wald, J., dissenting).

The significance of these two additional criteria, and the conflict between the Circuit Court's test and *Kissinger*, is evident from three considerations.

To begin with, from 1974 to 1993, the NSC was universally regarded as an agency under the test endorsed in *Kissinger*. The legislative history leaves no doubt that the Congress that enacted the amendments to the FOIA in 1974, and enacted the PRA in 1978, concluded that the NSC was an agency under the sole function test. *See* Appendix at A43. Moreover, on the eve of the enactment of the PRA, the Office of Legal Counsel issued a detailed analysis concluding that the NSC is an "agency" under

Soucie. 2 Op. Off. Legal Counsel 197, 205 (1978). When the applicability of the FOIA to the NSC was presented to this Court in *Kissinger*, this Court was able to assume that the NSC was agency because its status under the sole function test was never questioned by the NSC or anyone else in the Executive Branch. The NSC has not changed in any material way since *Kissinger* was decided in 1980, but the ruling below has changed the standard for identifying agencies within the EOP.

The Circuit Court's departure from the standard that Congress adopted is also evident from the contrast between *Soucie* — the decision that Congress specifically endorsed — and the ruling below. In *Soucie*, the plaintiff sought a report on the supersonic transport prepared at the President's request by the Office of Science and Technology ("OST"), but OST argued that it was staff to the President, not an "agency" under the Administrative Procedure Act ("APA"). 448 F.2d at 1070-71. Like the NSC, OST was part of the EOP, and it was headed by the President's personal advisor on scientific matters. *Id.* at 1074 & n.22. OST was created by a presidential reorganization plan to (1) advise and assist the President in achieving coordinated federal policies for the promotion of basic research and education in the sciences, and (2) "'to evaluate scientific research programs undertaken by agencies of the Federal government." Reorganization Plan No. 2 of 1962, Pt. I, § 3, 76 Stat. 1253 (1962). The Court, nonetheless, held that OST's authority to evaluate research programs made the OST an agency because, despite its proximity to the President, its authority went beyond advising and assisting the President. 448 F.2d at 1075. If OST's minimal authority was sufficient to make the OST an agency, the NSC's functions, which dwarf OST's functions in scope, magnitude and gravity, are certainly sufficient to make the NSC an agency under the

standard that Congress endorsed. *See* Appendix at A39, A41 (Tatel, J., dissenting) (NSC authority over nonproliferation and public diplomacy is indistinguishable from that of OST over research programs).

Finally, *Meyer* and the decision below represent a sharp break from the pre-*Meyer* decisions applying *Soucie*. These decisions held that an EOP unit is an agency if its mandate included the authority to "issue guidelines to federal agencies," "coordinate federal programs," oversee "activities of federal agencies," *Pacific Legal Foundation v. Council of Environmental Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (Council on Environmental Quality is an agency), or provide information to Congress, *Sierra Club v. Andrus*, 581 F.2d 895, 902 (D.C. Cir. 1978) (Office of Management Budget is an agency); *accord Energy Research v. Defense Nuclear Facilities*, 917 F.2d 581, 584-85 (D.C. Cir. 1990). Although the NSC and its subgroups have the same type of authority over the protection of classified information, telecommunications, emergency preparedness planning, and public diplomacy, the ruling below holds that the NSC is not an agency under *Meyer*'s interpretation of *Soucie*. *See* Appendix at A18, A20 (NSC's authority to oversee and evaluate are not sufficient to make it an agency).[6]

The majority's conclusion that the NSC is not sufficiently distinct from the President to be an agency is

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[6] The only decision prior to *Meyer* holding that an EOP unit was not an "agency" is *Rushforth v. Council of Economic Advisors*, 762 F. 2d 1038 (D.C. Cir. 1985), in which the court concluded that the Council of Economic Advisors was not an agency. The court found that the Council was not an agency because the President had not given the Council authority to issue regulations, or to coordinate or oversee federal programs, *id.* at 1041-43 — the very type of authority that has been delegated to the NSC.

particularly striking because of the NSC's separate legal identity and size. The NSC is not the creation of a presidential executive order or reorganization plan, but was established by Congress in the National Security Act of 1947. 50 U.S.C. § 402(a). The statute not only establishes the NSC, but controls, in substantial part, its structure and organization. *Id.* § 402(c), (g). The NSC's committees and working groups report to its Executive Secretary, a position established by the statute. Appendix at A11. The NSC has an intricate hierarchical system of twenty-five working groups that report to more senior committees. *Id.* at A69, A72. The NSC's procedures are designed so that presidential participation is required only if the committees and staff are unable to resolve issues within their delegated authority. *See, e.g.*, 49 Fed. Reg. 20780 § 5.a (1984); Appendix at A73-74, A78 (NSC adjudicates in many areas such as declassification, export licensing and FOIA requests, without the participation of the President). This committee system also insulates most of the 150 staff in the NSC bureaucracy from direct interaction with the President.

Indeed, in 1978, the Office of Legal Counsel specifically rejected the current claim that, because the President is a member of the NSC, "in all cases the [NSC's] action must be viewed as Presidential action," 2 Op. Off. Leg. Counsel at 203. The law refutes this contention, the Legal Counsel concluded, because the NSC "was created by Congress as an entity distinct from the Presidency," and "the independent authority which it possesses, it possesses as the National Security Council." *Id.* at 204. Moreover, much of the NSC's authority is exercised through subordinate committees "which are empowered by executive order to perform important, substantive and far-reaching governmental functions . . . without Presidential participation." *Id.* These observations

and the Office of Legal Counsel's conclusion that "the NSC is a body having functions, power, and authority of its own and is not simply an *alter ego* of the President," are no less true today. *Id.* (italics in original).[7]

In concluding that the NSC is, nevertheless, not an agency, the ruling below casts doubt on the status of other EOP units that Congress has considered, and the Executive Branch has acknowledged, are agencies under the "sole function" test. 55 Fed. Reg. 46037 (1990) (Office of Administration, Office of Science and Technology Policy, Office of United States Trade Representative, and Office of National Drug Control Policy are agencies). Other EOP units have "proximity" to the President and are headed by the President or Presidential advisors. *See, e.g.*, Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101, 91 Stat. 1633, § 2 (1977) (Office of Administration headed by the President). All EOP units, like the NSC, answer to the President and must exercise their authority in accordance with his executive orders and directives. The ruling below's suggestion that these characteristics may "overwhelm" the substantial governmental authority exercised by these EOP units creates uncertainty concerning the application of the federal records laws within the EOP.

Congress clearly intended that EOP entities be required to manage and preserve their records in accordance with the Federal Records Act, and that they be

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[7] The Office of Legal Counsel's September, 1993 opinion withdrawing this 1978 opinion does not reject this analysis of the NSC's separate legal identity, but, instead, concludes that NSC functions discussed in the Opinion were not sufficient to make the NSC an agency. However, in 1993 the Office of Legal Counsel did not evaluate most of the NSC functions that the district court concluded make the NSC an agency.

subject to disclosure to the extent provided in the Freedom of Information Act. The decision below represents a fundamental departure from the test adopted by Congress and endorsed by this Court in *Kissinger*, and should be reviewed by this Court.

Moreover, because of the District of Columbia Circuit's unique authority over the EOP, this Court should review this ruling even though there is no inter-circuit conflict. The units of the EOP are located solely within the District of Columbia Circuit. Consequently, with respect to records preservation issues, the District of Columbia Circuit is likely to be the only court with jurisdiction to provide an effective remedy for improper management of EOP records. Indeed, it is doubtful that any court outside the District of Columbia Circuit could have enjoined the destruction of NSC and EOP records, as occurred in this case. With respect to FOIA, although litigation outside the District is possible, it appears unlikely that a conflict will emerge from other courts because the District of Columbia Circuit has been the exclusive authority on the application of *Soucie* to the EOP. Apart from this Court's decision in *Kissinger*, we have been unable to identify *any* published opinion of a court outside the District of Columbia Circuit addressing whether any unit of the EOP is an agency. In the past, this Court, recognizing the District of Columbia Circuit's preeminent role in administrative law, has reviewed the Circuit's important decisions on FOIA issues despite the absence of a conflict. *See, e.g., Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989); *Kissinger*, 445 U.S. at 146. The Court should do the same here.

II. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S RULING IN *KISSINGER* AND EXEMPTS VITAL HISTORICAL RECORDS OF THE NSC FROM THE FEDERAL RECORDS LAWS.

The Circuit Court ruled that the NSC is exempt from the Federal Records Act and the FOIA without even mentioning this Court's conclusion in *Kissinger* that "the National Security Council is an executive agency to which the FOIA applies." 445 U.S. at 156. The Circuit Court's silent rejection of this aspect of *Kissinger* is of exceptional importance because of the enormous volume of significant and historically important documents that the NSC generates and holds. The NSC acts as the "highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence and special activities, and attendant policies and programs." Exec. Order No. 12,333, § 1.2(a), *reprinted in* Appendix at A112. The NSC, its staff, and its subgroups play comparable roles as the highest tribunal for government policy on national security planning, emergency preparedness, and similar issues.[8] Accordingly, the records of the NSC represent a critical chronicle of both the development of national security policy and the implementation of those policies within the government.[9]

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[8] *See* Appendix at A114-26, Exec. Order 12,472, § 2(a), (c)(4) (emergency telecommunications functions); Exec. Order 12,656, § 104(a) (emergency preparedness); Exec. Order 12,829, § 102(a) (industrial security program); Exec. Order 12,919 § 104(a), (c) (defense industrial resources preparedness).

[9] During the period that the NSC acknowledged that it was an agency, NARA consistently treated the NSC's substantive records as

The records actually preserved as a result of this case underscore this point. The injunctions entered against the NSC during this litigation secured the preservation of (i) records used by the Tower Commission, congressional investigators and the Independent Counsel looking into the Iran-Contra Affair; (ii) records used by the Department of Justice in connection with its prosecution of Manuel Noriega; and (iii) records used by the NSC in connection with the confirmation of Robert Gates as Director of the Central Intelligence Agency. *See Armstrong v. EOP*, 1 F.3d at 1283 n.7. The improper destruction of such records is a clear and present danger to the preservation of the history of our government. The destruction and falsification of NSC records in an effort to cover-up the Iran-Contra Affair is well-documented.[10] Moreover, the NSC itself would have destroyed most of these records but for the injunctions entered in this case. The ruling below, however, gives a green light to such improper destruction of NSC records.

First, the ruling below makes the NSC entirely exempt from any obligation to preserve its records in accordance with the Federal Records Act. Under the District of Columbia Circuit's construction of the law, the unlawful destruction of NSC records, whether the papers are in paper or electronic form, is immune from judicial review. Furthermore, because the NSC is not an agency under the

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worthy of permanent retention because of the NSC's central role in shaping national security policy. *See* 44 U.S.C. § 2107 (authorizing Archivist to take custody of historically important records for preservation).

[10] Report of the Congressional Committees Investigating the Iran-Contra Affair, H. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess, 306-07 (1987); *United States v. North*, 716 F. Supp. 644, 647 (D.D.C. 1989).

ruling below, the NSC's management of records is not subject to oversight by the Archivist, and the NSC is not required to comply with the Archivist's regulations on records management.

Moreover, if agency records are improperly removed, the Federal Records Act provides that the Archivist may initiate legal action to retrieve them. *See* 44 U.S.C. §§ 2905, 3106; *Kissinger*, 445 U.S. at 148; *Armstrong v. Bush*, 924 F.2d at 294. However, under the ruling below, NSC records are not subject to this provision, and the Archivist is powerless to recover improperly removed NSC records. *See Armstrong v. EOP*, 1 F.3d at 1291 (citing *Armstrong v. Bush*, 924 F.2d at 290).

The ruling below also exempts the NSC from the Freedom of Information Act, so that the NSC is under absolutely no obligation to disclose its records. Over the past twenty years, the NSC has processed thousands of FOIA requests as an agency under the FOIA. Sensitive NSC records containing national security secrets, or intra-governmental deliberations have, of course, been protected from disclosure by FOIA's exemptions protecting these materials. *See* 5 U.S.C. § 552(b)(1), (5); *see also* Appendix at A48-49, A84-85; 2 Op. Off. Legal Counsel at 205 n.15 (discussing exemptions available to the NSC). Nonetheless, the requirement that nonsensitive NSC records be disclosed under the FOIA has played an important role in providing the public with information on the NSC's role, and in exposing controversial or improper activities.

Thus, the practical effect of the Circuit Court's rejection of *Kissinger*'s statement that the NSC is an agency provides further reason for this Court to grant review. The ruling exempts the NSC from the records preservation and disclosure laws after decades in which Congress, this Court, and even the NSC, regarded the

NSC as an agency subject to these laws. The NSC's broad authority rivals or exceeds that of any "agency," and immunizing the NSC's records from the federal records laws represents a significant change in the application of these laws that should not be permitted to stand without further review.

CONCLUSION

This Court should grant the petition to review the District of Columbia Circuit Court's ruling that the NSC is not an agency.

Respectfully submitted,

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Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, *et al.*

Petitioner,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 1995 Decided August 2, 1996

No. 95-5057

SCOTT ARMSTRONG, ET AL.,
APPELLEES/CROSS-APPELLANTS

v.

EXECUTIVE OFFICE OF THE PRESIDENT, ET AL.,
APPELLANTS/CROSS-APPELLEES

Consolidated with
95-5061

Appeals from the United States District Court
for the District of Columbia
(No. 89cv00142)

Freddi Lipstein, Senior Counsel, United States Department of Justice, argued the cause for appellants, with whom *Frank W. Hunger,* Assistant Attorney General, *Eric H. Holder, Jr.,* United States Attorney, and *Leonard Schaitman,* Attorney, United States Department of Justice, were on the briefs. *Michael J. Singer,* Assistant Director, and *Matthew M. Collette,* Attorney, United States Department of Justice, entered appearances.

Michael E. Tankersley argued the cause for appellees, with whom *David C. Vladeck* and *Alan B. Morrison* were on the briefs.

Before: EDWARDS, *Chief Judge,* GINSBURG and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Dissenting Opinion filed by *Circuit Judge* TATEL.

GINSBURG, *Circuit Judge*: This case presents the question whether the National Security Council is an "agency" subject to the Freedom of Information Act, 5 U.S.C. § 552(f), that is, whether the NSC is an "executive department ... or other establishment in the executive branch." If so, then the NSC is both subject to the disclosure requirements of the FOIA and obligated to preserve its records in accordance with the Federal Records Act, 44 U.S.C. §§ 3101-07, 3301-14.

The plaintiff-appellees are the National Security Archive, a research institute and library; Scott Armstrong, a journalist affiliated with the Archive; and several associations, including the National Library Association and the National Historical Association (hereinafter referred to collectively as Armstrong). The defendant-appellants are the Executive Office of the President; the Office of Administration and the NSC, which are components of the EOP; the White House Communications Agency, an element of the Department of Defense; and Trudy Peterson, the Acting Archivist of the United States.

The district court granted Armstrong's motion for summary judgment, declared that the NSC is an agency subject to the FOIA, and directed it to comply with both the FOIA and the FRA. The court carved out an exception, however, for the records of high-level officials of the NSC who serve solely to advise and assist the President. *Armstrong v. Executive Office of the President*, 877 F. Supp. 690, 705-06 (D.D.C. 1995).

The Government appeals, arguing that because the NSC does not exercise substantial authority, independent of the President, it is not an agency within the meaning of the FOIA and that its treatment as such would so intrude upon the core functions of the President as to "raise a significant constitutional concern" about the separation of powers. Armstrong cross-appeals, challenging the exception for high-level officials who act solely as advisers to the President.

Because the NSC operates in close proximity to the President, who chairs it, and because the NSC does not exercise substantial independent authority, we conclude that the NSC is not an agency within the meaning of the FOIA. Accordingly, we reverse the judgment of the district court without reaching the question raised by the plaintiffs' cross-appeal.

I. Background

The statutory mandate of the NSC is generally "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security" and to perform "such other functions as the President may direct." National Security Act of 1947, 50 U.S.C. §§ 402(a)-(b). The Council members are the President and certain cabinet-level officials, including the National Security Adviser (NSA)—formally, the Assistant to the President for National Security Affairs. The NSC staff, which numbers about 150 persons, is headed by an Executive Secretary, who reports to the NSA, and whom the President appoints without need of Senate confirmation. *Id.* § 402(c).*

The Presidential Records Act, 44 U.S.C. § 2201 *et seq.*, which applies to most NSC documents, provides in part that a president's records are to be made publicly available five years after he leaves office, except that national defense and certain other information is to be made available no later than 12 years after the end of a president's term. § 2204. For purposes of the PRA, presidential records do not include "any documentary materials that are . . . official records of an agency," as the term "agency" is defined in the FOIA, 5 U.S.C. § 552(f). 44

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*For clarity of exposition, we refer to the President and the cabinet-level officials who constitute the senior decision-making body of the NSC as the "Council" or "statutory Council." We use "the NSC" to mean, depending upon the context, either the staff that supports the statutory Council or the entire organization, including both the Council and the staff.

U.S.C. § 2201(2)(B)(I). At the same time, the coverage of the FRA is coextensive with the definition of "agency" in the FOIA, *see Armstrong v. Executive Office of the President,* 1 F.3d 1274, 1293 (D.C. Cir. 1993). As a result, no record is subject to both the FRA and the PRA: "The FRA describes a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials that are subject to a different and less rigorous regime." *Id.*

The PRA and the FRA differ in several respects that are of concern to the parties to this case. First, while both laws require the preservation of records, the procedures to prevent improper destruction of documents covered by the FRA are significantly more demanding; hence, the district court ordered the NSC to adopt new guidelines in order "to ensure that non-Presidential records are preserved under the Federal Records Act and not destroyed under the guise of the Presidential Records Act." 877 F. Supp. at 707. Second, record-keeping requirements of the FRA are subject to judicial review and enforcement; those of the PRA are not. *Armstrong v. Bush,* 924 F.2d 282, 295 (D.C. Cir. 1991). Third, the joint regime of the FRA and the FOIA can affect a president's daily operations during his term of office, while the PRA is applicable to a president's papers only after he has left office. Fourth, insofar as NSC records are subject to the FRA, a president may not take such documents with him upon leaving office (as past presidents have generally done) without the approval of the Archivist. 44 U.S.C. §§ 3303, 3303a; *see also* 44 U.S.C. § 3106 (Attorney General may initiate legal action to retrieve records unlawfully removed).

The legal controversy over procedures for the preservation of NSC records has a lengthy and complex history, which is fully recounted in *Armstrong,* 1 F.3d at 1280-82. In January 1989 Armstrong made a request under the FOIA for all documents stored in the EOP and the NSC electronic communications systems since their installation in the mid-1980's. At the same time Armstrong sought a declaration in district court that those electronic documents and associated

backup tapes are federal or presidential records, and an injunction prohibiting their destruction. For our present purpose it is sufficient to recall that the district court concluded that certain items stored in the NSC's computer system are records subject to the FRA, and that the NSC's guidelines relating to the preservation of those records were arbitrary and capricious. *Armstrong v. Executive Office of the President,* 810 F. Supp. 335 (D.D.C. 1993). When, four months thereafter, the Government still had not promulgated new guidelines for the management of those electronic records, the district court entered an order of contempt. 821 F. Supp. 761 (D.D.C. 1993). On appeal we agreed that the NSC's guidelines were inadequate, but we reversed the contempt citation, which was premised upon the Government's failure to act by a date certain. 1 F.3d at 1274. At the same time, upon Armstrong's cross-appeal challenging the NSC's procedures for classifying records, we remanded the matter for the district court to determine whether the NSC properly distinguishes between presidential and federal records. *Id.*

The Office of Legal Counsel then rendered an opinion reversing the position it had taken in 1978 and declaring that the NSC is not an agency subject to the FOIA and therefore does not have to comply with the FRA. Memorandum of Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel to Alan J. Kreczko, Special Assistant to the President, Sept. 20, 1993. President Clinton adopted the OLC's new position but instructed his NSA, Anthony Lake, that the NSC should voluntarily disclose "appropriate" records, including those that had been "transferred by one Administration to another for transition and continuity purposes." Memorandum from the President, Mar. 2, 1994. The Executive Secretary thereupon revoked the NSC's FOIA guidelines and asserted that all NSC documents are presidential records, exempt from both the FOIA and the FRA. Memorandum of William H. Itoh to William H. Leary, Mar. 25, 1994.

The district court then issued the decision that we now review. The court rejected the OLC's analysis and held that the

NSC is an agency subject to the FRA and must maintain and preserve its records in accordance with that statute. 877 F. Supp. at 695. According to the district judge, the NSC does not solely advise and assist the President. *Id.* at 700. Rather, the NSC exercises authority independent of the President in several areas, including: overseeing the CIA, providing guidance and direction to the intelligence community, and protecting classified information. *Id.* at 702-03. Nonetheless, the court held that in "limited circumstances" when "high level officials of the NSC . . . act not as members of an agency but, solely as advisors to the President," the resulting records are governed by the PRA, not by the FRA. *Id.* at 705. In the alternative, the district court held that the NSC should be treated as an agency because the NSC had itself previously determined that it was an agency and operated accordingly but had not offered a reasoned explanation for its later change of position. *Id.* at 706.

On this appeal the Government contends, *inter alia,* that the interaction between the President and the NSC requires privacy and confidentiality. Notwithstanding that national security information and deliberative documents are exempt from disclosure under the FOIA, 5 U.S.C. § 552(b)(1) and (5), the Government contends that the possibility of premature disclosure pursuant to the FOIA would make the President's conduct of national security policy excessively circumspect and would chill the communication necessary for effective and efficient decision-making. We need not wade into such deep waters, however, in order to resolve the present controversy.

II. Analysis

"Records" are defined by the FRA as documentary materials "made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business." 44 U.S.C. § 3301. For purposes of the FOIA, the Congress originally defined an agency as "each authority of the Government of the United States," subject to certain enumerated exceptions not relevant

here. Administrative Procedure Act, 5 U.S.C. § 551(1). In *Soucie v. David,* 448 F.2d 1067, 1073 (D.C. Cir. 1971), which concerned coverage under the FOIA of the Office of Science and Technology, another unit in the Executive Office of the President, we interpreted this definition to encompass "any administrative unit with substantial independent authority in the exercise of specific functions." In 1974 the Congress amended the FOIA definition to cover any "establishment in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. § 552(f). This expanded definition was not, however, meant to cover "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 14 (1974).

That the Congress intended to codify *Soucie* is clear enough. *See Meyer v. Bush,* 981 F.2d 1288, 1291 (D.C. Cir. 1993). Less clear is the test of an entity's status as an "agency" subject to the FOIA. Is it (a) whether the entity exercises "substantial independent authority," as we put the matter in *Soucie;* or (b) whether, in the terms of the Conference Report, the entity's "sole function is to advise and assist the President"? As applied to an official or a group of officials who serve in dual roles, the two tests may yield different results. On the difficulty presented by the so-called dual-hat problem, *see Ryan v. Department of Justice,* 617 F.2d 781, 789 (D.C. Cir. 1980) (unit or official that is part of agency and has non-advisory functions cannot be "non-agency in selected contexts on a case-by-case basis"), and *Kissinger v. Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 156 (1980) (notes made by National Security Adviser "in his capacity as Presidential adviser, only" not agency records despite NSA's dual role as official of NSC).

Because we conclude below that neither the statutory Council nor the NSC staff performs significant non-advisory functions, we need not address the dual-hat controversy. Nor need we address the implications of that controversy for the exception created by the district court for high-level officials.

A. The Three-Factor Test of Meyer

In *Meyer* the court managed to harmonize the "sole function" and the "substantial independent authority" criteria by using a three-factor test to determine the status under FOIA of a unit in the Executive Office of the President. There we held that a group of senior advisers to the President, working within the EOP as the Task Force on Regulatory Relief, did not constitute an agency under the FOIA even though the group "evaluated agency regulatory efforts and had authority to provide some direction over agency rulemaking." 981 F.2d at 1292. Reading the Conference Report against the background of *Soucie,* we inferred that the Congress intended the phrase "solely to advise and assist the president" to refer to "entities whose characteristics and functions were similar to those of the president's immediate personal staff." *Id.* at 1293. Therefore we identified "three interrelated factors" relevant to determining whether those who both advise the President and supervise others in the Executive Branch exercise "substantial independent authority" and hence should be deemed an agency subject to the FOIA. These factors are: (1) "how close operationally the group is to the President," (2) "whether it has a self-contained structure," and (3) "the nature of its delegat[ed]" authority. *Id.* These three factors are not necessarily to be weighed equally; rather, each factor warrants consideration insofar as it is illuminating in the particular case.

The closer an entity is to the President, the more it is like the White House staff, which solely advises and assists the President, and the less it is like an agency to which substantial independent authority has been delegated. And while a definite structure may be a prerequisite to qualify as an "establishment within the executive branch," *see id.* ("The President does not create an 'establishment' . . . every time he convenes a group of senior staff or departmental heads to work on a problem"), not every establishment is an agency under the FOIA. Although structure and function may be related for purpose of defining an agency—clear lines of authority facilitate the implementation of policy—they are not the same consideration.

The three-part test of *Meyer* is designed succinctly to capture the court's prior learning on the subject whether a unit within the Executive Office of the President is an agency covered by the FOIA. As reflected in those cases, the specific evidence bearing upon that question varies with the entity in question. In *Pacific Legal Foundation v. Council on Environmental Quality,* 636 F.2d 1259, 1262-63 (D.C. Cir. 1980), we held that the Council on Environmental Quality is an agency because of its independent authority to "issue guidelines to federal agencies," "coordinate federal programs," and oversee certain activities of other federal agencies. The Office of Science and Technology is within the ambit of the FOIA, notwithstanding its proximity to the President, because it has independent authority to evaluate federal scientific programs, initiate and support research, and award scholarships. *Soucie,* 448 F.2d at 1075. The Office of Management and Budget is a FOIA agency, in part because it has a statutory duty to provide budget information to the Congress. *Sierra Club v. Andrus,* 581 F.2d 895, 902 (D.C. Cir. 1978).

On the other hand, although the Council of Economic Advisers is fairly characterized as an "establishment"—it has a staff, a budget, and a defined structure—it has no regulatory power or other functions, under either its organic statute or any Executive Order, that would suggest that it exercises independent authority; therefore, it is not a FOIA agency. *Rushforth v. CEA,* 762 F.2d 1038, 1043 (D.C. Cir. 1985). Nor do the staff of the Executive Residence come under the FOIA; their duty is to manage the President's home subject to his direction and approval, which they do without the delegation of substantial independent authority. *Sweetland v. Walters,* 60 F.3d 852, 854-55 (D.C. Cir. 1995).

In this case, if the operating relationship between the NSC and the President is as close as the Government maintains, then a hierarchical structure, large staff, and separate budget will not by themselves subject the NSC to the FOIA; Armstrong will have to show that the NSC exercises significant independent authority in order to qualify it as an agency. It is not the number of functions delegated to the NSC, but the degree of

the NSC's independence in discharging them, that matters. *See Meyer*, 981 F.2d at 1293. If Armstrong shows that the NSC does exercise substantial independent authority, then the NSC cannot be said solely to advise and assist the President; that is the consequence of the "sole function" test set forth in the Conference Report and fleshed out in *Meyer*.

Whether an entity without a self-contained structure could ever qualify as an agency that exercises substantial independent authority seems very doubtful. For this reason, we take up first the question whether the NSC has a self-contained or determinate structure. If the organizational lines of authority and responsibility within the NSC are undefined, or the NSC cannot readily be distinguished from other elements of the Executive Office of the President that solely advise and assist the President, then we do not need to go any further down the *Meyer* road in order to conclude that the NSC is not a distinct agency. Because we conclude that the NSC's structure is self-contained, however, we do go on to examine the other *Meyer* factors; only then are we led to the conclusion that the NSC is not an agency subject to the FOIA.

1. The Structure of the NSC

We said in *Meyer* that a "characteristic of the President's immediate staff is its lack of a firm structure." 981 F.2d at 1296. Here the district court correctly characterized the NSC as having a "firm structure," a staff, and a separate budget, 877 F. Supp. at 700-01, making it less like (to quote the Conference Report again) "the President's immediate personal staff or [a] unit[ ] in the Executive Office [of the President] whose sole function is to advise and assist the President." For its part, however, the Government contends that the NSC staff overlaps that of the President's immediate personal staff and that the structure of the NSC merely reflects and confirms its role as the personal instrument of the President; the organization and functions of the NSC staff are molded by each President, acting through his National Security Adviser, to reflect the priorities of that President.

President Clinton's National Security Adviser, Anthony Lake, implies, in a declaration submitted to the district court, that the NSC is not the self-contained structure it might seem from a glance at its organization chart. The NSC staff, he reports, "operates within the White House as the President's foreign policy and national security staff"; indeed, he points out, several individuals occupy positions on the organizational charts of both the White House and the NSC.

Armstrong responds by emphasizing the hierarchical NSC organization chart, which, he argues, reveals an elaborate, self-contained structure and bureaucracy of the sort indicative of an agency under the analysis in *Meyer*. We agree. The NSC staff is not an amorphous assembly from which ad hoc task groups are convened periodically by the President. On the contrary, it is a professional corps of more than 150 employees, organized into a complex system of committees and working groups reporting ultimately to the Executive Secretary. There are separate offices, each responsible for a particular geographic region or functional area, with clearly established lines of authority both among and within the offices. The several points of tangency between the White House and the NSC staff noted by Mr. Lake do not intertwine the NSC with "the President's immediate personal staff" in any way that obscures the line of perforation between the NSC and other units in the EOP; in fact, all of the individuals holding titles on both the NSC and White House staffs are in a non-substantive area, public affairs.

We conclude that the NSC has a structure sufficiently self-contained that the entity could exercise substantial independent authority. The remaining question is whether the NSC does in fact exercise such authority. We approach that question, as we did in *Meyer*, by considering how close the operation of the NSC is to that of the presidency, and by examining the nature of such authority as has been delegated to the NSC.

2. The Proximity of the NSC to the President

Armstrong concedes that the NSC is "proximate" to the President, but he could hardly do otherwise: The President chairs the statutory Council, and his National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff. The intimate organizational and operating relationship between the President and the NSC is, in our view, entitled to significantly greater weight in evaluating the NSC's arguable status as an agency than is the self-contained structure of the entity. Accordingly, Armstrong must make a strong showing indeed regarding the remaining factor under *Meyer* before we can conclude that the NSC exercises substantial authority, independent of the President.

3. The Nature of the Authority Delegated to the NSC

The Government's position is, as it must be, that neither the Congress nor the President has delegated any function to the NSC other than that of advising and assisting the President. We consider first the question of congressional delegation.

Under the National Security Act, the NSC is authorized to: (a) advise the President upon national security matters; (b) coordinate the policies and functions of other departments and agencies regarding national security matters; (c) assess and appraise the objectives and commitments of, and the risks facing, the United States; (d) consider policies on national security matters; and (e) make recommendations to the President. 50 U.S.C. §§ 402(a)-(b). The Government deems it self-evident that these statutory provisions do not by themselves authorize the NSC to perform any non-advisory function.

Armstrong's only argument to the contrary is based upon a section of the Act providing that the Director of Central Intelligence acts "[u]nder the direction of the National Security Council" and "as the President or the National Security Council may direct." 50 U.S.C. §§ 403-3(a)(1), 403(c)(6). Armstrong maintains that this provision (as "reinforced" by Executive Order 12,333) delegates independent authority to the NSC. As we understand it, however, the statute delegates authority not to the institutional NSC but to the President and the statutory

Council headed by the President. A member of the Council acts not as the head of his or her department but as an adviser or assistant to the President. Our observations in *Meyer* regarding the Task Force on Regulatory Relief, of which the President was not himself a member, are even more clearly applicable to the statutory Council, which the President chairs:

> [I]t is rather hard to imagine that ... any ... head of a department or agency who *reports directly* to the President, would acquiesce in a [Council] decision that was thought not to represent directly and precisely the President's opinion. It seems implicit that ... members of the [Council] were not expected to resolve disputes themselves, *without presenting those disputes to the President,* unless they already knew the President's views on the exact issue. This, of course, means the [Council] was not expected to act with significant independence.

981 F.2d at 1295 (emphasis in original).

Nor does anything in the record suggest that the President has empowered the NSC staff to direct the DCI in any way. On the contrary, the staff's Senior Director for Intelligence Programs stated at his deposition, "I don't have the ability to issue instructions or directions to agencies. I would merely convey a decision made by the President or by the National Security Adviser or Deputy National Security Adviser on behalf of the President."

We conclude that the NSC staff does not "direct" the CIA in the conduct of its business, nor tell the DCI what to do except insofar as it may relay the decisions of the President and his senior advisers on the statutory Council. Indeed, we find it inconceivable that the DCI, who himself sits on the Principals Committee (the senior interagency decision-making group for national security policy), would take direction from a member of the NSC staff acting on his or her own behalf.

The larger battle between the parties is not over the statute in any event; it is over various presidential delegations to the NSC. The district court, observing that successive presidents have, through a series of Executive Orders and National

Security Decision Directives (NSDDs), expanded the NSC's involvement in the areas itemized in the Act, concluded that the NSC has accreted authority to act independently in a variety of areas. It is this position that Armstrong defends most expansively on appeal.

In the Government's view, the district court mistook the gradual expansion of the NSC's advisory and assisting functions for the delegation of independent authority. Indeed, we are told, successive presidents expanded the NSC's responsibilities not in order to hypothecate their powers but, on the contrary, the better to secure their personal control over the fragmented national security apparatus. This interpretation finds direct support in the report of the Tower Commission, which, in the course of examining possible involvement by NSC staff members in the Iran-Contra matter, concluded that the NSC "has from its inception been a highly personal instrument of the President" and "remain[s] a strictly advisory body." John Tower et al., *Report of the President's Special Review Board*, at II-1, II-2 (1987).

Armstrong argues that the President has delegated authority to the NSC in a number of specific areas. We review below his best examples, each of which the Government vigorously disputes. We conclude that, notwithstanding Armstrong's detailed efforts to document a decisional role for the NSC staff, the staff exercises no substantial authority either to make or to implement policy. Insofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA, or the statutory Council, the staff's functions are, of course, quintessentially advisory. Likewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own.

Protection of national security information. Executive Orders 12,333 and 12,356 respectively authorize the NSC (1) to provide "review of, guidance for, and direction to, the conduct" of intelligence activities, and (2) to "provide overall policy direction for the information security program." According to Armstrong, these (to us rather cryptic) delegations make the

NSC the administrative court of last resort for resolving disputes over what information can be released to government contractors and disputes between agencies concerning the protection and declassification of classified information. The NSC offers a different perspective on its role: In providing overall policy direction and carrying out the referenced Executive Orders, the NSC merely monitors other agencies in order to assure that the objectives of the President, who retains ultimate authority over classified information, are achieved. Specifically, the NSC states that its declassification reviews, although described by the district court as "adjudicatory," 877 F. Supp. at 702, are really nothing more than the internal management of the information that the NSC generates in advising the President.

At oral argument, Armstrong took strong exception to this last assertion. He contends that the NSC's declassification function extends to all "material produced or processed for the NSC staff, even if not originally classified by an authorized member of the staff." That is, some of the material subject to NSC declassification is held by other agencies. If so, then the NSC would seem to be exercising discretionary authority beyond the internal management of its own information.

When pressed for an example, Armstrong referred the court to § 3.1(c) of Executive Order 12,356, in which the President authorized the NSC to hear appeals from the decisions of the Information Security Oversight Office, an entity outside the NSC with jurisdiction over declassification procedures. In response to a question from the bench, however, Armstrong conceded that he is aware of no instance in which the appellate process has been invoked. We are reluctant to consider the mere formality of a delegation of authority, unexercised and for all that appears, therefore, of no consequence, the indicium of an entity with substantial independence from the President.

Moreover, in April 1995 President Clinton issued a new directive, replacing Executive Order 12,356 and transferring overall policy direction for information security to the Director of the Office of Management and Budget, in consultation with the NSA. Armstrong is therefore limited to arguing that the

NSC was an agency by virtue of the Executive Order when the records at issue in this action were created.

Our dissenting colleague goes further, however. Focusing upon a regulation promulgated under the since-revoked Executive Order that authorized the NSC to decide whether a federal agency should be granted a waiver permitting it to use a non-standard security form for access to classified information, 32 C.F.R. § 2003.20(k), Judge Tatel suggests not only that we look to whether the NSC was an agency when the disputed records were produced, but also that the regulation may remain in effect notwithstanding the revocation of Executive Order 12,356 and the issuance of Executive Order 12,958. Our response is twofold: First, the burden is upon Armstrong to show that a regulation issued pursuant to a superseded Executive Order remains in effect, and he has not even tried to do so. Second, we are not asked in this round of litigation to resolve the status of particular documents; instead, we must declare whether the NSC is an agency subject to the FOIA and the FRA. In reaching that judgment, we apply the law in effect at the time we render our decision. *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974).

Telecommunications policy. Armstrong argues next that the NSC has a non-advisory role in controlling the National Communications System—a consortium of entities responsible for providing communications for the federal government under emergency conditions, including nuclear attack. By virtue of a regulation issued by the Federal Communications Commission, under the authority of the Communications Act of 1934, 47 U.S.C. § 606, and various other statutes, the NSC has "[a]uthority to develop plans, policies, and procedures for the establishment of ... priorities" aimed at restoring communications services in a national emergency. 47 C.F.R. §§ 211.1(b), 211.6(g). Control over the National Communications System is not, however, assigned to the NSC; the presidentially appointed "Executive Agent" is the Secretary of Defense. Exec. Order 12,472 § 1(e). Armstrong maintains that while the Secretary has been delegated authority over some specified matters involving telecommunications, the NSC is

responsible for other matters. *See* National Communications System Directive 2-1 § 8. The NSC counters that whatever authority it has over telecommunications it does not exercise autonomously; *i.e.*, the NSC may propose, but it is for the President to approve, policy in this area.

The governing regulations and Executive Order 12,472 establish that the NSC participates in setting priorities for the restoration of telecommunications during a national emergency—priorities that may bind even non-governmental telecommunications common carriers and users. *See, e.g.*, 47 C.F.R. § 213.0(b). Armstrong has not, however, established that any of this authority can be exercised without the consent of the President, and the NSC cannot be deemed an "agency" if it does not exercise some substantial non-advisory authority of its own.

Our dissenting colleague asserts that because 47 C.F.R. § 213.7(g) provides that certain telecommunications "authority is reserved to the National Security Council" in the event of an emergency, Armstrong has satisfied his burden of showing that the NSC can exercise such authority without the consent of the President. The regulation affords a scant basis upon which to conclude that the NSC can act, independent of the President, should an emergency arise. Nor is there any support for the dissent's view that the NSC, merely by developing the telecommunications plan set forth in 47 C.F.R. §§ 201-16, has already demonstrated substantial independence of the President. The development of a plan, without more, does not attest to its independent preparation much less to its adoption without the consent of the President or his NSA.

Emergency preparedness. The President has delegated to the NSC some authority over emergency preparedness and crisis management, *see* Exec. Order 12,656 § 104(a), and instructed all departments and agencies with responsibility for national defense preparedness to adhere to NSC "policy and guidelines" in that area. Exec. Order No. 12,919 § 104(c). The NSC nonetheless disclaims any autonomous role in emergency preparedness policy-making, that is, any role beyond providing advice and assistance to the President. Instead, the NSC claims

that it serves simply as "the principal forum" for consideration of policy (quoting Exec. Order No. 12,656 § 104(a)).

In reply, Armstrong points to NSDD 188, which establishes a Senior Interagency Group (SIG) for National Security Emergency Preparedness, reporting to the President through the NSC. This group, which is chaired by the National Security Adviser, is authorized—again rather cryptically, it seems to us—to "oversee the implementation of the goals and principles" involved in emergency mobilization planning. When asked at oral argument whether there is anything in the record to indicate what the SIG actually does, Armstrong conceded that there is nothing before us to confirm that the SIG in fact oversees anything or anyone. In any event, for the NSC to serve as an intermediary between the President and a group that "oversee[s] the implementation of ... goals and principles" set by the President is not to implement those goals itself. We are hesitant to conclude that merely "overseeing" (if it does) and reporting to the President upon the activities of others are functions sufficiently distinct from advising and assisting the President to weigh in favor of treating the NSC as an agency subject to the FOIA.

Non-proliferation. Both Armstrong and the dissent argue that the NSC exercises authority, independent of the President, in the area of nonproliferation because the NSC examines and makes recommendations to the Department of Commerce regarding export license applications. We disagree. First, if the Departments of Commerce and Energy make an initial determination that an examination is necessary, 15 C.F.R. pt. 778, supp. 1 (1995), that examination is actually undertaken not by the NSC but by an ad hoc interagency working group that may not even qualify as an "establishment within the executive branch." *Meyer*, 981 F.2d at 1293 ("The President does not create an 'establishment' ... every time he convenes a group of senior staff or departmental heads to work on a problem"). Second, although the NSA acknowledges that the working group is part of the NSC, he also notes that a "Special Assistant to the President ... represents the President on each [group] ... [and he] takes his direction from me or my Deputy, on behalf

of the President." Finally, the Secretary of Commerce must consider, but is not bound by, the recommendation of the working group. 50 U.S.C. App. § 2409(f)(1)(1994).

The dissent dismisses this last point on the ground that the APA treats as an agency even an entity whose decisions are "subject to review by another agency." 5 U.S.C. § 551(1). That obliterates the distinction between making a decision that will be implemented unless it is disapproved upon appeal to a higher authority, and rendering advice that will not be implemented unless it is affirmatively adopted by that authority. Furthermore, Judge Tatel's suggestion that there is no material difference between *ex ante* approval and *ex post* review equates "preview" (to view in advance) with "review" (to view again). Quite clearly, the NSC's recommendations are previewed, not reviewed, by the Department of Commerce before they are adopted.

Public diplomacy. In NSDD 77 the President directed an interagency Special Planning Group, chaired by the National Security Adviser, to engage in "diplomatic and technical planning relative to modernization of U.S. international broadcasting capabilities, the development of anti-jamming strategies and techniques, planning relative to direct radio broadcast by satellite and longer term considerations of the potential for direct T.V. broadcasting." This Special Planning Group is "responsible for the overall planning, direction, coordination and monitoring of implementation of public diplomacy activities." *Id.* The NSC coordinates the work of four standing committees of the Special Planning Group, each of which is chaired by a member agency.

Armstrong argues that NSDD 77 vests in the NSC authority to "direct" public diplomacy programs. The Government responds that NSDD 77, while it does contemplate that the interagency Planning Group will be supported by NSC staff, does not assign substantive authority to the NSC; all activities are carried out by the member agencies.

From NSDD 77 itself we think it quite clear that ultimate authority to set objectives, determine policy, and establish programs rests elsewhere than with the NSC. Armstrong would

have the court equate a monitoring function to the authority to establish and implement programs. As we see it, however, the President uses the NSC to provide the direction and coordination necessary to secure conformity to overall goals fixed by the President. That is not a delegation of substantial authority for the NSC to act independently of the President.

Our dissenting colleague suggests that the reviewing function of the Special Planning Group is "sufficiently similar to the evaluative function that we found warranted treating the OST as an agency in *Soucie*." Even if we were to agree with that assessment, it is simply not relevant to the NSC. (Recall our emphasis in *Meyer* upon the "interrelated" nature of the three factors set out there. 981 F.2d at 1293.) That the Special Planning Group may review the activities of four permanent coordinating committees is not sufficient to offset the essential identity between the statutory Council and the President—an identity distinctive to the NSC and completely without parallel at the OST.

Further, Judge Tatel elaborates the responsibilities of two of the committees supervised by the Special Planning Group, and concludes that activities such as "training private groups to encourage the growth of democratic institutions" and "planning and coordination of international broadcasting" constitute substantial delegations of authority to act, independent of the President. According to the dissent, "[t]he key question is not who sets the goals toward which an entity works, but whether an entity itself takes action in furtherance of executive branch goals." Therein lies the crux of our disagreement.

In determining whether an entity is an agency we do not lump together all its activities that advance any goal of the executive branch. Rather we distinguish between advising and assisting the President on the one hand and exercising independent authority on the other. The question is not only whether the President sets the goal, but the generality of that goal; the more general the goal the greater the likelihood that the responsible entity is vested with some element of discretion and is not just advising or assisting the President. Neither Armstrong nor the dissent has demonstrated that the Special

Planning Group or any of the four interagency committees that it supervises is vested with sufficient discretion to say that it exercises authority, independent of the President.

4. Summary and Conclusion

We determined first that the NSC has the self-contained structure necessary for it to be considered an executive establishment, and second that structure standing alone, is not sufficient to overweigh the significance of the close proximity—indeed the essential identity—between the statutory Council and the President. Only with a strong showing that the NSC staff exercises substantial independent authority, therefore, could Armstrong succeed in portraying the NSC as an agency subject to the FOIA.

We conclude that on the record before us Armstrong has not carried his burden of showing that the NSC exercises meaningful non-advisory authority. Most clearly, the Congress has not itself (*i.e.*, by statute) delegated substantial authority to the NSC. Armstrong therefore rests his case principally upon such delegations as successive presidents have made in various Executive Orders and National Security Decision Directives. Under none of these, however, does the NSC appear to exercise any significant non-advisory function.

Armstrong has shown that the NSC staff has authority to review requests for document declassification, and has apparent authority to decide appeals from decisions of the ISOO, but the record is silent upon the question whether the NSC uses that authority and does so without direct supervision by the President. Armstrong has also pointed to delegations from the President to the NSC of functions in telecommunications, non-proliferation, and public diplomacy; but he has not shown that the NSC plays a substantive role apart from that of the President, as opposed to a coordinating role on behalf of the President. When arrayed against the overwhelming fact that the President is the head of the NSC, more is required to demonstrate that these staff activities cast the NSC in any role outside its statutory assignment to advise and assist the

President. Therefore, we hold that under the three-part test of *Meyer*, the NSC is not an agency subject to the FOIA.

B. Past Conduct and Statements

Armstrong also suggests that, quite apart from the *Meyer* test, the NSC's own past statements and conduct demonstrate that the NSC has functions in addition to those of advising and assisting the President. *See Soucie*, 448 F.2d at 1075 (prior conduct weighed in assessing whether entity is an agency). Armstrong cites these recent examples: (1) the Executive Secretary's 1993 staff memorandum on recordkeeping stating that "the NSC both advises and assists the President and is an agency"; (2) the Joint Statement of Facts submitted to the district court in this case, in which the parties state that the NSC's "responsibilities include . . . performing independent functions set forth in the governing statute, as well as in regulations and Executive Orders"; and (3) the NSC's memorandum in support of its motion to dismiss a previous case brought by Armstrong, in which the NSC reports having responsibilities in the "management of the interagency process for national security affairs". Armstrong notes also that each Administration has left behind so-called institutional records of the NSC, which the NSC has managed under the FRA rather than the PRA; he claims that the NSC thereby implicitly conceded that it is an agency.

According to the Government, these examples of the NSC's past statements and conduct do not have the significance that Armstrong claims for them. First, the Executive Secretary's recordkeeping memorandum was intended to guide NSC staff members in creating, maintaining, and preserving records in conformity with the OLC's legal opinion, then prevailing within the Executive Branch, that the NSC was an agency. That opinion was reversed some months later. Second, the NSC's submissions in earlier rounds of this litigation can hardly be read to concede the central point in contention here. In the Joint Statement of Facts, the NSC was just acknowledging that it does a variety of things pursuant to the delegations listed

therein; in the memorandum of law supporting the Government's motion to dismiss the prior case, it acknowledged only a coordinating role ("management of the interagency process") typical of an entity within the Executive Office of the President acting on behalf of the President in relation to the agencies with operating responsibilities. As to Armstrong's third point, about "institutional records," the NSC responds that every president has treated most of the NSC's records as presidential records and removed them at the end of his administration. That the NSC, in the interests of permitting public access to some NSC records and ensuring a smooth transition on national security matters, voluntarily subjected certain of its records to the FOIA and the FRA does not reflect any intention to concede, and should not be taken to establish as a matter of law, that the NSC is subject to those statutes.

We agree with the Government on this point as well. The NSC's prior references to itself as an agency are not probative on the question before the court—whether the NSC is indeed an agency within the meaning of the FOIA; quite simply, the Government's position on that question has changed over the years. Moreover, as Armstrong conceded at oral argument, even as the NSC was treating some of its institutional records as though they were subject to the FOIA and the FRA, it was declining to treat other records in that way. In sum, the NSC's past behavior has been inconsistent—both logically and factually—and therefore does not illuminate the legal question here in dispute.

Finally, the district court held in the alternative that the NSC did not set forth, in the March 25, 1994 memorandum from William H. Itoh to William H. Leary, a reasoned explanation for its change of position on the question whether it is an agency, and that this is a sufficient ground in itself, pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), to set aside the Government's newly adopted position as arbitrary and capricious. 877 F. Supp. at 706 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)). Armstrong made no such argument in district court, nor does he defend the judgment of the district

court upon this alternate ground. In any event, invocation of the APA begs the question whether the NSC is an "agency" within the meaning of that term as it is used in the APA. *See* 5 U.S.C. § 551(1) (agency defined as "each authority of the Government of the United States"). Because we have concluded that the NSC is not, after all, an agency subject to the FOIA, the district court's alternative rationale, regardless of its provenance, is now moot.

C. The Legislative History of the PRA

Before concluding, we respond to the suggestion elaborated at some length in the dissent that the status of the NSC as an agency could be resolved by looking instead to the legislative history of the PRA rather than to our own prior cases. The argument, in brief, goes like this: When the Congress enacted the PRA in 1978, both the Congress and the President were aware that the NSC complied with the FOIA. Moreover, the Congress intended that any agency which, apparently like the NSC, "is now subject to the FOIA would remain so." H.R. REP. NO. 1487, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5742. Accordingly, by its express terms, the PRA excluded from coverage any documentary materials that are official records of an agency subject to the FOIA. 44 U.S.C. § 2201(2)(B). Ergo, for us to hold that the NSC is not an agency within the meaning of the FOIA, and is therefore subject to the PRA rather than to the FRA, is contrary to the intent of the Congress that passed the PRA.

The legislative history of the PRA also reveals, however, that the Congress intentionally aligned the definition of "agency" in the FOIA with the test we had announced in *Soucie*. *See Meyer*, 981 F.2d at 1291 ("As clearly shown by the legislative history ... Congress intended to codify our earlier decision ... in *Soucie*"); H.R. CONF. REP. No. 1380, 93d Cong., 2d Sess. 14-15 (1974). By incorporating the *Soucie* test, the Congress made a deliberate decision to forego specifically listing the NSC and other EOP units as agencies, as had been done in the House Report. H.R. REP. NO. 876, 93d Cong., 2d

Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. Instead, the Congress adopted a flexible, judicially-created test and handed the matter back to the courts, anticipating that we would continue to shape and refine the basic *Soucie* definition—as indeed we did when we established the three-factor test in *Meyer*. There is nothing to indicate that the Congress intended specifically to define the NSC as a FOIA agency apart from a judicial determination to that effect.

III. Conclusion

Based upon the record before this court, we conclude that the NSC is not an agency under the FOIA and, therefore, that its records need not be managed in compliance with the FRA. The NSC has a self-contained structure, but the proximity of the NSC's operations to the President, who chairs the statutory Council, is more significant; the close working relationship between the NSC and the President indicates that the NSC is more like "the President's immediate personal staff" than it is like an agency exercising authority, independent of the President. Accordingly, for Armstrong to prevail, his showing regarding the nature of the authority delegated to the NSC must be compelling, which on this record it is not. For the foregoing reasons, the judgment of the district court that the NSC is an agency under the FOIA is

Reversed.

TATEL, *Circuit Judge, dissenting*: The court today concludes that the National Security Council does not exercise sufficiently independent authority to be an "agency" for purposes of the Freedom of Information Act, 5 U.S.C. § 552 (1994), and the Federal Records Act, 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-14 (1994). I respectfully disagree. The NSC, an entity within the Executive Office of the President that complied with FOIA during the administrations of Presidents Ford, Carter, Reagan, and Bush, declared itself exempt from FOIA only recently while this litigation was pending. In my view, the record demonstrates that the NSC exercises, in areas such as information security,

telecommunications, non-proliferation, and public diplomacy, just the sorts of independent authority that our cases hold satisfy the requirements of the FOIA definition of "agency." Holding the NSC subject to FOIA and the Federal Records Act is consistent with those statutes and their purposes. Moreover, FOIA's exemption for national security materials, combined with the inapplicability of FOIA and the Federal Records Act to certain materials produced by NSC members who hold separate non-NSC positions, such as in the Office of the President or the Office of the Vice President, ensures that the NSC's compliance with these statutes would not interfere with the President's development of foreign policy.

I.

Our task in this case is to determine whether the NSC is an agency for purposes of the Federal Records Act and is therefore subject to the records disposal guidelines set forth in that statute. Because the same documents cannot simultaneously be subject to the different requirements of the Federal Records Act and the Presidential Records Act, 44 U.S.C. §§ 2201-07 (1994), *see Armstrong v. Executive Office of the President,* 1 F.3d 1274, 1293 (D.C. Cir. 1993) (*Armstrong II*), and because the Presidential Records Act specifies that its coverage and the coverage of FOIA are mutually exclusive, *see* 44 U.S.C. § 2201(2)(B), this court has treated the definition of "agency" in the Federal Records Act as coterminous with the FOIA definition of "agency," *see Armstrong II,* 1 F.3d at 1293. We have also held that, in light of the suggestion in FOIA's legislative history that Congress intended to adopt this court's approach in *Soucie v. David,* 448 F.2d 1067 (D.C. Cir. 1971), FOIA's definition of "agency," though literally including "*any* ... establishment in the executive branch of the Government (including the Executive Office of the President)," 5 U.S.C. § 552(f) (emphasis added), does not include EOP units whose sole functions are to advise and assist the President or that do not exercise "substantial independent authority." *See Rushforth v. Council of Economic Advisors,* 762 F.2d 1038, 1040-43 (D.C. Cir. 1985); *Soucie,* 448 F.2d at 1073, 1075. Although these two formulations of the *Soucie* rule—the "sole function"

test and the "substantial independent authority" inquiry—might conceivably point in different directions for certain entities, *see* Maj. op. at 7, our precedents seem to require us to view them, to the extent possible, as essentially opposite sides of the same coin. In other words, if an entity has some significant function apart from advising and assisting the President, then we should view the agency as exercising substantial independent authority and therefore as a FOIA agency.

A.

In *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), we held that in determining whether an entity within the Executive Office of the President that "help[s] the President supervise others in the executive branch" exercises substantial independent authority, we should focus on three factors: the unit's proximity to the President, "the nature of its delegation from the President," and "whether it has a self-contained structure." *Id.* at 1293. We treated the three factors not as elements to be weighed against each other as in a balancing test, but rather as keys to understanding the nature of an EOP unit's functions in order to determine whether the unit exercises substantial independent authority apart from advising and assisting the President. Although I agree with the court's conclusion that the NSC has a self-contained structure—*Meyer*'s final factor—I think the court fails to appreciate the functional nature of the *Meyer* inquiry in its analysis of the first two factors.

Regarding the first *Meyer* factor—proximity to the President—I certainly agree with my colleagues that, in light of the President's membership on the NSC, the NSC is proximate to the President. In my view, that conclusion should simply be a starting point for our consideration of the second *Meyer* factor; we still must analyze how the President's membership on the NSC affects that entity's functions. With all due respect, I fear the President's membership on the NSC has obscured from my colleagues the extent to which the NSC actually exercises independent authority.

In *Meyer*, we "assume[d] ... that Congress intended the phrase 'solely to advise and assist' the President to refer to

entities whose characteristics and functions were similar to those of the President's immediate personal staff." *Id.* In other words, the EOP units that Congress meant to exclude from the coverage of FOIA are those as close operationally to the President as his personal staff. Apparently to make clear that proximity to the President is important to the extent that it suggests something about function, we explained that the proximity factor referred to a unit's "continuing interaction" with the President. *Id.*

Generally, an entity's proximity to the President makes it more likely that its functions are advisory. That is, the closer an entity is to the President, the less likely we are to find truly independent authority; the further from the President, the more likely the entity's authority is truly independent. The entity at issue in *Meyer,* the Task Force on Regulatory Relief, was a small committee operating in such close proximity to the President that none of its decisions could fairly be described as independent of him. *See id.* at 1294. The NSC has a more complex structure than the Task Force. On the one hand, the President himself is a member of the NSC. On the other hand, the NSC is a much larger entity, many of whose parts are not nearly as close to the President as was the Task Force in *Meyer.* According to the reasoning underlying *Meyer*'s proximity factor, then, while we should expect some NSC functions to be akin to those of the President's personal staff, we should not be at all surprised to find independent functions exercised by the less proximate NSC staff and numerous NSC interagency groups. Even with the President as a member, the NSC is a legal entity distinct from the President, and the record indicates that responsibilities delegated to the NSC are in fact carried out without the personal involvement of the President.

It is with respect to the remaining element of the *Meyer* inquiry—the nature of the authority delegated to an EOP unit—that I part most significantly from the court's approach. In my view, the greatest challenge posed by the *Soucie* and *Meyer* tests is reading the phrase "advise and assist the President" in a meaningful but not overly broad way. A host of executive branch activities that Congress subjected to FOIA can

also be viewed as activities that "assist the President," for surely the President is assisted in executing the laws by every delegation of power that he makes. *See Meyer*, 981 F.2d at 1293. As we made clear in *Meyer*, we must not allow the "advise and assist" exception to swallow the FOIA rule. That is exactly what I fear the court has done today.

Apparently because of the President's membership on the NSC, the court treats the *Meyer* delegation prong in what I believe to be an unrealistic fashion, expecting Armstrong to demonstrate that NSC activities reflect a sort of independence from the President that neither FOIA nor our cases envision as a requirement for FOIA agencies. For example, I think the court makes too much turn on whether an entity may act without the consent of the President. The court suggests that an entity cannot have "substantial non-advisory authority of its own" unless it may exercise its authority "without the consent of the President." Maj. op. at 17. Although saying that an entity does not seem "independent" if it must obtain consent before acting makes a certain amount of linguistic sense, this cannot be what our cases mean by "independent." To be an agency under the Administrative Procedure Act (and thus FOIA) an entity does not need to be able to act without consent. The APA definition of "agency"—which is less encompassing than the FOIA definition—includes "each authority of the Government of the United States, *whether or not it is within or subject to review by another agency.*" 5 U.S.C. § 551(1) (1994) (emphasis added). Nothing in the APA definition suggests that it excludes entities that, before taking action, must submit plans for review and approval by another agency. That is, even an entity that acts only with the consent of another agency could still be an agency under the APA and thus under FOIA. Crucial to the "agency" inquiry is not whether an entity is unaccountable to all other agencies within the executive branch, but whether the entity has the power to act provided no higher authority disapproves.

This case, of course, does not concern an executive branch entity that must obtain the consent of another agency, but an entity within the Executive Office of the President that may

under certain circumstances have to obtain the consent of the President, who is not an "agency" under the APA, *see Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). That an entity's actions are subject to the President's consent is hardly unusual and should certainly not be a basis for exempting an entity from FOIA. I doubt that any President would permit an EOP unit to act against his will or that other executive agencies would comply with any order from an EOP unit thought not to reflect either the President's wishes or his general policies, yet FOIA clearly specifies that EOP units can be "agencies" under the statute. The problem with the court's view of consent is that the very notion of agency embodies consent. As the Government argued in an earlier stage of this litigation, "An 'agency' is generally understood as being responsible to a 'principal': it is the instrumentality through which another works. The President ... is the principal in the executive branch to whom agencies are responsible." Brief for Appellants at 19, *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) (No. 90-5173) (citation omitted).

The court's focus on consent risks treating FOIA as if it were more concerned with decisionmaking than with decision implementation. Nothing in FOIA contains any such indication. FOIA gives private citizens access to information from executive branch agencies that do the work of government. Its "sole function" exception excludes only a small subset of entities within the Executive Office of the President that do not themselves "do" anything apart from advising the President and assisting him in what he does.

In determining whether an EOP unit exercises independent authority or only advises and assists the President, I would therefore focus on whether the unit actually takes action itself, as opposed to taking steps simply to assist the President in taking action. For example, a unit within the Executive Office of the President might be viewed as merely assisting the President if its activities prepare the President for action or facilitate his actions. In contrast, if the President actually delegates to the unit responsibility for taking certain action itself, then the unit is not simply assisting the President to take

action, but is itself exercising delegated authority. If the entity is itself taking action, then it matters little that the President retains power to approve or disapprove the entity's action. Indeed, if the President were to delegate an enormous amount of authority to an entity within the Executive Office of the President with the understanding that the entity would submit weekly proposals of its actions for the President's approval, the mere fact that the entity could not act without the President's consent would not be grounds to exempt that entity from the coverage of FOIA or the Federal Records Act as long as it is the entity itself that acts. To the extent that the entity does the work of government—exercising authority in a way that has concrete effects either on the interests of private citizens or on other parts of the government—the entity is engaging in just the sort of official activity that the Federal Records Act and FOIA were designed to bring into public view.

B.

In my view, the court's failure to appreciate the functional focus of the *Meyer* inquiry has led it to the erroneous conclusion that the NSC does not exercise substantial independent authority apart from advising and assisting the President. Although a court applying the "sole function" test need find only one non-advise-and-assist function to conclude that an EOP unit is an agency for FOIA and Federal Records Act purposes, I describe below several examples of significant non-advise-and-assist functions carried out by the NSC that should render it an agency.

Information Security

The record persuasively demonstrates that the NSC has repeatedly performed a classic agency adjudicatory function in deciding whether waivers should be granted to permit federal agencies to use non-standard security forms. Federal regulations establish that, as part of a "government-wide information security program" to "enhance the protection of national security information and/or [to] reduce the costs associated with its protection," executive branch departments and independent agencies must use a standard non-disclosure form (or one of its predecessors). 32 C.F.R. § 2003.1 (1995).

The regulations require that all employees of executive departments and independent agencies, as well as employees of government contractors and licensees, sign a standard security form "before being granted access to classified information." § 2003.20(b)-(c). Agencies may also require other persons to sign the standard form before obtaining such access. § 2003.20(d). According to the regulations, although use of the standard form by departments and agencies is "mandatory," § 2003.2, an agency may request a waiver from the requirement of using the standard form. § 2003.20(k). The regulations provide that "[o]nly the National Security Council may grant an agency's request for a waiver from the use of the [standard form]." *Id.* An agency requesting a waiver must submit a proposed alternative to the Director of the Information Security Oversight Office, who, after consulting with the Department of Justice on the enforceability of the proposed alternative agreement form, will "mak[e] a recommendation to the National Security Council." *Id.*

The record in this case documents several instances in which the NSC has exercised this independent function. It approved waivers for the Central Intelligence Agency (after a dispute between that agency and the ISOO), for the National Security Agency, and for the Board of Governors of the Federal Reserve System. In the course of the present litigation, the Government has admitted that "[o]fficials of the NSC approve or disapprove requests for waiver from the obligation to use standard forms prescribed by 32 C.F.R. Part 2003, without the personal involvement of the President." Supplemental Responses of Defendant to Plaintiffs' First Set of Requests for Admission, *Armstrong v. Executive Office of the President,* 877 F. Supp. 690 (D.D.C. 1995) (No. 89-0142). Although the Government argues that "it is the National Security Advisor, in his role as the President's advisor, who performs the key functions of approving" waivers, Brief of Appellants at 34, the record demonstrates that the NSC staff reviews waiver requests and the Executive Secretary of the NSC signs grants of waivers. Significantly, the relevant regulation does not give this power to the National Security Advisor, but rather states that "[o]nly the

National Security Council may grant" such waivers. 32 C.F.R. § 2003.20(k). This function alone—exercising the power, without the personal involvement of the President, to decide whether executive branch and independent agencies may use non-standard security forms—would be sufficient to render the NSC an agency.

Whether the regulation that gives the NSC the power to grant these waivers is still in effect is not entirely clear. The ISOO issued the regulation pursuant to section 5.2(b)(7) of Executive Order No. 12,356, which in 1983 gave the ISOO Director "the authority to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program." Exec. Order No. 12,356, § 5.2(b)(7), 3 C.F.R. 166, 176 (1983), *reprinted in* 50 U.S.C. § 435 (1994). Under Executive Order No. 12,356, the NSC had responsibility for "overall policy direction for the information security program." *Id.* § 5.1(a), 3 C.F.R. at 175 (1983), *reprinted in* 50 U.S.C. § 435. In 1995, President Clinton revoked Executive Order No. 12,356. *See* Exec. Order No. 12,958, 60 Fed. Reg. 19,825, at 19,843 (1995). Executive Order No. 12,958 gave the Director of the Office of Management and Budget authority to issue directives to implement the order and placed the ISOO within the OMB. *See id.* §§ 5.2(a), 5.3, 60 Fed. Reg. at 19,838-39. Although Executive Order No. 12,958 gave the Director of the ISOO "the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order," *id.* § 5.3(b)(7), 60 Fed. Reg. at 19,839—a delegation similar to the one in Executive Order No. 12,356 under which the ISOO issued the regulation originally giving the NSC final responsibility over waiver decisions—the NSC may no longer retain this power under Executive Order No. 12,958.

Nevertheless, even if the NSC no longer has the power to rule on these waiver requests, it exercised substantial, independent authority without the involvement of the President, and was thus an agency, when it did have this authority—including when some of the records at issue in this

lawsuit were produced. Because a functional test serves to determine whether an entity is an "agency" for purposes of FOIA and the Federal Records Act and because presidential delegations of authority can suffice to render an entity an agency, executive orders can have the effect of bringing an entity within or outside the coverage of FOIA. The "sole function" test requires that, to be exempt from FOIA, an EOP unit have no significant non-advise-and-assist functions. Therefore, the NSC's waiver authority, when it existed, was alone sufficient to bring the NSC within FOIA's definition of "agency."

The court's citation of *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974), for the proposition that "we apply the law in effect at the time we render our decision," Maj. op. at 16, is beside the point. *Bradley* presented the question whether a statute enacted during the course of a particular lawsuit should be applied to that lawsuit. *See Bradley,* 416 U.S. at 709-11. In the present case, the relevant "law [that is] in effect at the time we render our decision" and that we must apply to the facts in the record is the FOIA definition of "agency." Armstrong seeks access to NSC records dating from the mid-1980s. The question before us, then, is whether the NSC is now or was for any time since the mid-1980s an agency under the FOIA definition. The court's effort to discount the relevance of a delegation of authority that may no longer be in effect is unpersuasive. In any event, as I explain below, I think that other NSC functions are enough to render the NSC an agency even if the NSC no longer has power to rule on security form waiver requests.

Telecommunications

The NSC possesses and has exercised substantial independent authority in the area of telecommunications. Together with the Office of Science and Technology Policy, the NSC has published extensive plans for telecommunications regulation "during crises and emergencies." *See* 47 C.F.R. §§ 201-216 (1995). Included among these plans is a "precedence

system for the expeditious handling of messages and calls transmitted over Government and public correspondence facilities in all types of situations from peacetime to massive nuclear attack." § 213.1(a). With the Federal Communications Commission, the NSC has established a "Priority System for Intercity Private Line Services" in order to protect "[p]rivate line services for military, governmental, and other essential users." § 213.7(g) (citing FCC Order 67-51). These telecommunications plans provide that during emergencies, although communications common carriers will normally be permitted to "use their judgment in determining" how many circuits to devote to categories of public correspondence entitled to precedence over other messages and calls, "the authority is reserved to the National Security Council or the Federal Communications Commission, as appropriate to the time and situation, to revise the decisions of the carriers respecting the allocation of circuits, and to resolve any questions which are referred to them by the carriers or the users." *Id.* Thus, during national emergencies, the NSC has authority to decide whether communications common carriers have devoted adequate circuits to public correspondence deserving precedence and to resolve other questions referred by carriers or the users of their services. To me, this is a classic example of substantial independent authority.

In rejecting the NSC's emergency telecommunications responsibilities as substantial independent authority, the court states that "Armstrong has not ... established that any of this authority can be exercised without the consent of the President." Maj. op. at 17. The court offers no explanation, however, of what it would have Armstrong show. If the court means that Armstrong must show that the NSC is not obligated to obtain the President's consent each time it exercises its authority, Armstrong has satisfied this burden: The regulation clearly states that the relevant "authority is reserved to the National Security Council or the Federal Communications Commission, as appropriate to the time and situation." 47 C.F.R. § 213.7(g). The plain language of the regulation thus gives the NSC, where appropriate for it to act instead of the

FCC, the authority to act without first seeking the President's consent. If the court means that Armstrong must show that the NSC may exercise its authority even over the objection of the President, then the court has created an impossible hurdle. No EOP unit can be "independent" of the President in the way that independent agencies outside the executive branch can.

Proposing another possible reason to discount the NSC's telecommunications responsibilities, the Government argues that responsibilities shared with other entities cannot suffice to bring the NSC within FOIA. This argument has no foundation in either the statute or the "sole function" test. The *Meyer* test is premised in part on the notion that, in order for an EOP unit to be considered an agency, it must not be too similar to the President's personal staff; in other words, the agency must take some sort of action that is independent of the President's action. But nothing in FOIA or the sole function test requires that an agency's authority be independent of authority exercised by another executive branch entity. The fact that a delegation of authority requires two executive branch entities to cooperate in carrying out clearly non-advise-and-assist functions does not mean that the entities exercise no authority sufficiently separate from the President to be "agencies" under FOIA. It simply means that both agencies exercise such authority together and are thus both potentially subject to FOIA.

One other potential objection to giving weight to the NSC's telecommunications responsibilities is their possibly hypothetical nature. The record does not indicate whether the NSC has ever exercised its authority over communications common carriers during an emergency. I raise this point because, with respect to another NSC function, the court expresses its "reluctan[ce] to consider the mere formality of a delegation of authority, unexercised and for all that appears, therefore, of no consequence, the indicium of an entity with substantial independence from the President." Maj. op. at 16. My colleagues express their hesitation with respect to a power—to decide appeals from certain decisions of the ISOO—whose non-exercise is apparently due to the fact that it has been found to be of little or no use. The NSC's

telecommunications authority, in contrast, would likely prove very useful and perhaps necessary given the occurrence of certain events, such as a national emergency. I doubt that the Government or the court would suggest that an entity given important responsibilities in the event of a national emergency would not be subject to FOIA until such an emergency took place. Once such an emergency occurred and the entity exercised its contingent authority, the entity certainly would be an agency subject to FOIA. It defies the purpose of FOIA to suggest, however, that the statute Congress passed to bring government operation into more public view would not entitle the public to important information about the entity—including, for example, information about whether it is in fact prepared to carry out its responsibilities in case of a national emergency—until it is too late for the information to be of perhaps its most important use.

Most important, not all of the NSC's telecommunications authority is hypothetical. The NSC has already acted in conjunction with the Office of Science and Technology Policy and the FCC to develop the elaborate telecommunications plan contained in 47 C.F.R. §§ 201-216. In my view, then, the NSC's telecommunications responsibilities are enough to render it an "agency" for FOIA and Federal Records Act purposes.

Non-proliferation

The NSC has also been delegated authority to review and make recommendations regarding export license applications. Under regulations implementing section 309(c) of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2139a(c) (1994), the Secretary of Commerce has responsibility for initiating procedures for review of export licenses for "items ... that could be of significance for nuclear explosive purposes if used for activities other than those authorized at the time of export." 15 C.F.R. § 778.2(a) (1996). According to procedures adopted pursuant to the Non-Proliferation Act, if the Departments of Commerce and Energy believe that an export license application should be denied or reviewed by another agency,

these departments must refer the application to the Subgroup on Nuclear Export Coordination ("SNEC") of the NSC Ad Hoc Group on Nonproliferation, which "shall promptly consider any such application and provide its advice and recommendations to the Department of Commerce." *See* Procedures Established Pursuant to the Nuclear Non-Proliferation Act of 1978, pt. F, § 1(b), *reprinted in* 15 C.F.R. pt. 778, supp. 1 (1996) [hereinafter Non-Proliferation Procedures]. If the SNEC reaches agreement on the application, the Commerce Department must consider the SNEC's recommendation, *see* 50 U.S.C. App. § 2409(f)(1) (1994) (requiring the Secretary of Commerce to "take into account any recommendation of a department or agency with respect to [an] application in question"), and must give the license applicant an opportunity to respond to a negative SNEC recommendation, *see* 50 U.S.C. App. § 2409(f)(2) (1994). If the SNEC cannot reach agreement on the application, then the SNEC may refer the matter to the NSC Ad Hoc Group on Non-Proliferation, also an interagency working group, or afterward to the President. *See* Non-Proliferation Procedures, pt. F, § 1(b).

Because the non-proliferation procedures explicitly provide that the President has final authority to resolve interagency disagreements on the SNEC, review by the NSC Ad Hoc Group on Non-Proliferation in the event that the SNEC cannot reach agreement does not qualify as substantial independent authority under *Meyer*. In considering a similar review procedure whereby the Task Force on Regulatory Relief had the option of either resolving interagency disputes itself or referring them to the President, we expressed doubt in *Meyer* that "any ... head of a department or agency who *reports directly* to the President, would acquiesce in a Task Force decision that was thought not to represent directly and precisely the President's opinion." *Meyer*, 981 F.2d at 1295.

This does not settle whether, in those more numerous cases in which the SNEC reaches agreement about an export license application, SNEC application review and SNEC recommendations to the Commerce Department constitute exercises of substantial independent authority. As an initial

matter, the SNEC—an interagency working group that includes a nonvoting NSC representative and voting representatives from the Departments of Commerce, Energy, Defense, and State and the Arms Control and Disarmament Agency—is clearly part of the NSC. The Government does not dispute this. *See, e.g.*, Brief for Appellants at 43 n.30. Indeed, the current Assistant to the President for National Security Affairs so stated in a declaration in the record, and President Clinton's Presidential Decision Directive 2 on the "Organization of the National Security Council," dated January 20, 1993, makes clear that interagency working groups are part of the NSC. Second, evaluating applications to determine their propriety is a classic agency function. Because the APA treats as agencies even entities whose decisions are "subject to review by another agency," 5 U.S.C. § 551(1), it matters not that the Secretary of Commerce is bound only to consider the SNEC's recommendations, not to accept them. The SNEC's authority to evaluate export license applications for potential nuclear proliferation risks and make recommendations to another agency is no less "substantial independent authority" than was the Office of Science and Technology's power to evaluate federal research programs, which we held in *Soucie* was sufficient to render the OST an agency under the APA. *See Soucie*, 448 F.2d at 1073, 1075. Having no power to act upon its evaluations, the OST simply conducted its reviews and made its findings available for other government entities. Finally, SNEC authority to review license applications is far from hypothetical; the parties' joint statement of facts before the district court indicates that the SNEC regularly exercises this authority and that its recommendations have substantial influence in the Commerce Department's review of export license applications. According to the record, SNEC has reviewed hundreds of license applications under these procedures, and the Department of Commerce uniformly follows the SNEC's recommendations.

Public Diplomacy

Armstrong has also demonstrated that certain NSC interagency groups have substantial independent authority in the area of public diplomacy. In 1983, National Security Decision Directive 77 established an NSC Special Planning Group chaired by the Assistant to the President for National Security Affairs and including as members the Secretaries of Defense and State, the Directors of the United States Information Agency and the Agency for International Development, and the Assistant to the President for Communications. *See* Management of Public Diplomacy Relative to National Security, NSDD 77 at 1 (Jan. 14, 1983). NSDD 77 provides that the Special Planning Group "shall be responsible for the overall planning, direction, coordination and monitoring of implementation of public diplomacy activities" and "shall ensure that a wide-ranging program of effective initiatives is developed and implemented to support national security policy, objectives and decisions." *Id.* NSDD 77 also creates four interagency committees under the Special Planning Group's supervision. One of these committees, the International Political Committee, is "responsible for planning, coordinating and implementing international political activities in support of United States policies and interests relative to national security." *Id.* at 2. Among its tasks are providing "aid, training and organizational support for foreign governments and private groups to encourage the growth of democratic political institutions and practices." *Id.* In my view, training private groups to encourage the growth of democratic institutions can be considered "assisting the President" only by defining assisting the President so as to encompass nearly all executive branch activity.

Another of the four committees under the supervision of the Special Planning Group is the International Broadcasting Committee, which is "responsible for the planning and coordination of international broadcasting activities sponsored by the U.S. Government." *Id.* at 3. NSDD 77 specifies that "[a]mong its principal responsibilities will be diplomatic and

technical planning relative to modernization of U.S. international broadcasting capabilities" and "the development of anti-jamming strategies and techniques." *Id.* Technical planning of United States international broadcasting capabilities and developing both strategies and techniques of avoiding jamming of United States broadcasts are substantial delegations of authority that are almost certainly independent of any direct involvement by the President.

The court says little about the activities of these committees. Focusing instead on the Special Planning Group that reviews and provides guidance to these committees, the court finds dispositive that the Special Planning Group acts "to secure conformity to overall goals fixed by the President." Maj. op. at 20. Under this reasoning, nearly every EOP unit would be exempt from FOIA and Federal Records Act coverage. One way or another, the President sets goals for all executive branch agencies, including EOP units. The key question is not who sets the goals toward which an entity works, but whether an entity itself takes action in furtherance of executive branch goals. NSDD 77 clearly delegates to the Special Planning Group planning and monitoring responsibilities distinct from the actions of the President. Because it makes special provision for "[p]ublic diplomacy activities involving the President or the White House," requiring that these activities "be coordinated with the Office of the White House Chief of Staff," NSDD 77 at 1, NSDD 77 suggests that the Special Planning Group has responsibility for public diplomacy activities that do not involve the President. I do not understand how the purposes of the sole function test warrant the conclusion that an entity charged with "the overall planning, direction, coordination and monitoring of implementation of public diplomacy activities," *id.*, has no "substantial independent authority." At the very least, the Special Planning Group's function of "periodically review[ing] the activities of the four permanent coordinating committees to insure that plans are being implemented and that resource commitments are commensurate with established priorities," *id.*,

is sufficiently similar to the evaluative function that we found in *Soucie* warranted treating the OST as an agency.

C.

I think the framers of the Federal Records Act, FOIA, and the Presidential Records Act would be quite surprised to learn from the court's opinion that the Federal Records Act does not cover and FOIA does not guarantee citizens access to nonsensitive NSC documents regarding the request by the Federal Reserve System and other agencies to use nonstandard security forms with their employees and contractors; the NSC's national emergency telecommunications plans; hundreds of reviews of export license applications conducted by an NSC interagency group; and an NSC interagency group's development of anti-jamming broadcast strategies and techniques. These functions—along with other NSC activities—are classic examples of agency action performed without the personal involvement of the President. They are just the sorts of activities that subject an entity to FOIA and the Federal Records Act.

Holding that the NSC exercises substantial independent authority and is subject to FOIA and the Federal Records Act would be perfectly consistent with what those who enacted the Presidential Records Act thought they were doing when they designed the mutual exclusivity of that statute and FOIA. Unlike the Task Force at issue in *Meyer*, an entity created after the passage of FOIA and the Presidential Records Act, the NSC predates both statutes. In applying the legislative-history-based *Meyer* test, it therefore makes sense to take into account legislative history relevant to the NSC's status, not to sidestep *Meyer* and its elaboration of *Soucie*'s sole function test, but to hold in check this court's application of that test. This is so particularly because the language of the FOIA definition of "agency"—"any ... establishment in the executive branch of the Government (including the Executive Office of the President)"—clearly covers the NSC and because the only statutory basis for exempting the NSC from FOIA's coverage is a limited exception derived from the legislative history of FOIA. In my view, the legislative history of the Presidential

Records Act indicates just how far the court's application of the *Meyer* test has strayed from Congress's commands.

The Presidential Records Act and its legislative history clearly indicate that it was not the purpose of the Presidential Records Act to cover entities subject to FOIA at the time of the Presidential Records Act's passage. In 1978, when the House Report on the Presidential Records Act provided that "that which is now subject to FOIA would remain so," H.R. REP. NO. 1487, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5732, 5742, Congress was officially on notice of the NSC's compliance with FOIA from two separate sources. The NSC had issued FOIA regulations on February 19, 1975, *see* 40 Fed. Reg. 7316 (1975) (codified at 32 C.F.R. pt. 2101), and, as the record in this case indicates, the NSC had complied in 1975, 1976, 1977, and 1978 with FOIA's requirement that each covered agency annually submit a copy of its FOIA regulations and a report of its administration of FOIA to the Speaker of the House of Representatives and to the President of the Senate for referral to appropriate congressional committees, *see* 5 U.S.C. § 552(e) (formerly § 552(d)). In addition, the record of the 1978 hearings before the House Subcommittee of the Committee on Government Operations includes a report by the Library of Congress's Congressional Research Service concluding that eight EOP units, including the NSC, were agencies for FOIA purposes. *See* LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, APPLICABILITY OF THE FREEDOM OF INFORMATION ACT TO THE EXECUTIVE OFFICE OF THE PRESIDENT 20 (1978), *reprinted in Hearings on H.R. 10998 and Related Bills Before a Subcomm. of the House Comm. on Gov't Operations*, 95th Cong., 2d Sess. 759, 778 (1978) [hereinafter *Presidential Records Act Hearings*]. The report noted: "The NSC has FOIA regulations and has been the subject of court cases under the Act. The NSC has an active FOIA component." *Id.* at 8, *reprinted in Presidential Records Act Hearings* at 766. The CRS report further stated that, with respect to the Vice President, "it would seem that records generated by his duties as Smithsonian regent or NSC member would be the only records available under the FOIA from the

Office of the Vice President, assuming there are such records and they are located in that Office." *Id.* at 18, *reprinted in Presidential Records Act Hearings* at 776. In addition, by the time President Carter signed the Presidential Records Act into law in November 1978, *see* 14 WEEKLY COMP. PRES. DOC. 1965 (Nov. 6, 1978), the Office of Legal Counsel had advised the President in its Memorandum of September 6, 1978 that the NSC is an agency for FOIA purposes. *See* 2 Op. Off. Legal Counsel 197, 205 (1978), *withdrawn,* Memorandum from Walter Dellinger, Acting Assistant Att'y Gen., Office of Legal Counsel, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor, Nat'l Sec. Council (Sept. 20, 1993). Clearly, then, those responsible for the enactment of the Presidential Records Act in 1978—both Congress and the President—were on notice of the NSC's compliance with FOIA and its apparent status as a FOIA agency. Such indications in the legislative history of the Presidential Records Act that those who enacted that statute likely thought that it would not cover the NSC should make us hesitant to rule that Congress did not subject the NSC to FOIA.

Further support for treating the NSC as a FOIA agency may arguably be found in the legislative history of the 1974 FOIA amendments. A House Report noted that the amended FOIA definition of "agency" would include "such functional entities as ... the National Security Council." H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. This court has disavowed reliance on the House Report on the ground that a Conference Report subsequent to the House Report adopted the *Soucie* test without enumerating specific FOIA agencies. *See Rushforth,* 762 F.2d at 1040. Nevertheless, then-Justice Rehnquist's opinion for the Supreme Court in *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980), cited the 1974 House Report and described it as "indicating that the National Security Council is an executive agency to which the FOIA applies." *Id.* at 156.

II.

Because the court concludes that the NSC is not an agency for purposes of the Federal Records Act, it does not reach the

issue raised in Armstrong's cross-appeal: whether the district court erred in holding that the Presidential Records Act rather than the Federal Records Act applies to NSC records "in the limited circumstance in which a high level official of the NSC acts solely to advise and assist the President." *Armstrong v. Executive Office of the President,* 877 F. Supp. 690, 706 (D.D.C. 1995). In view of my conclusion in Part I that the NSC is an agency, I would reach this issue. To comply with one of our precedents and a decision of the Supreme Court, I would recognize an exception different from the one the district court suggested.

In *Ryan v. Department of Justice,* 617 F.2d 781 (D.C. Cir. 1980), we found no basis in FOIA to distinguish between the Attorney General and the Department of Justice such that the Attorney General would not be an agency for FOIA purposes when acting solely in an advisory capacity to the President. *See id.* at 786-89. A few weeks later, in *Kissinger,* the Supreme Court held that, assuming the NSC were an agency to which FOIA applies, documents related to the activities of the Assistant to the President for National Security Affairs when "act[ing] in his capacity as a Presidential adviser, only" were not subject to FOIA. *Kissinger,* 445 U.S. at 156.

Although the holdings of *Ryan* and *Kissinger* may appear in tension with one another, they are easily reconcilable. Indeed, we followed *Ryan* in a case concerning the Government in the Sunshine Act, 5 U.S.C. § 552b, decided within a year of *Ryan* and *Kissinger, see Pacific Legal Found. v. Council on Envtl. Quality,* 636 F.2d 1259, 1264 (D.C. Cir. 1980), and we have since discussed *Ryan*'s holding without suggesting that *Kissinger* called it into question, *see, e.g., Armstrong II,* 1 F.3d at 1295. The Supreme Court's holding in *Kissinger* was quite limited. The Court simply concluded that because the Office of the President is not part of the EOP and because Congress clearly wished to exclude from FOIA's coverage entities within the Office of the President—that is, the President's immediate personal staff and assistants—documents related to activities performed by a person with two positions, one in a FOIA agency and one in the Office of the President, while serving in

his or her capacity in the Office of the President are not subject to FOIA. *See Kissinger*, 445 U.S. at 156. Thus, a presidential assistant such as the Assistant to the President for National Security Affairs is not subject to FOIA while serving in that capacity even if he is subject to FOIA when acting in another capacity, for example, as a member of the NSC. *See id.* In contrast, *Ryan* involved the Attorney General, who, while often advising the President, does not hold an official position in the Office of the President as a presidential assistant. As we observed in *Ryan*, *see* 617 F.2d at 787-89, nothing in FOIA, in its legislative history, or in *Soucie*, which the legislative history purports to adopt, supports treating agencies or their parts as non-agencies whenever they perform advisory functions. Rather, Congress subjected to FOIA all EOP units except those whose *sole* functions are to advise and assist the President. *See Armstrong II*, 1 F.3d at 1295. Naturally, then, many entities subject to FOIA will also advise and assist the President.

The *Kissinger* holding thus addresses a limited situation: someone holding two positions, one in a FOIA agency and one in the Office of the President as a presidential assistant. Consistent with *Kissinger*, I would therefore hold that records created or received by, and in the control of, any NSC member who also holds a separate position, such as in the Office of the President or the Office of the Vice President, while acting in his or her non-NSC capacity are not NSC records. Holding the NSC subject to FOIA and the Federal Records Act would thus not render subject to those statutes documents of the Assistant to the President for National Security Affairs, the Vice President, or other NSC members while acting in their non-NSC capacities (unless their non-NSC activities are otherwise subject to FOIA and the Federal Records Act). *Cf.* LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, *supra*, at 18-19, *reprinted in Presidential Records Act Hearings* at 776-77 (reaching similar conclusion with respect to the Vice President). I think it is in keeping with *Kissinger*, however, to hold that the records of such officials are subject to FOIA and the Federal Records Act when those officials act in connection with the NSC to carry out or assist in carrying out NSC

functions, even when those NSC functions are advising or assisting the President. Consistent with this court's decision in *Ryan* but contrary to the district court's holding, otherwise qualifying records in the control of NSC officials while acting in NSC capacities should be considered agency records for purposes of FOIA and federal records under the Federal Records Act, even if such officials hold high level positions within the NSC and even in circumstances in which such officials act to advise or assist the President.

III.

My view that the NSC is an agency for purposes of FOIA and the Federal Records Act also requires that I consider the Government's argument that subjecting the NSC to the requirements of these statutes would violate constitutional separation of powers principles by intruding improperly into the President's exercise of his constitutional duties. The district court rejected this argument, as would I. Although we should avoid statutory constructions that would raise serious constitutional problems, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575 (1988), none is raised by subjecting the NSC to FOIA and the Federal Records Act. In upholding a statute giving the Administrator of General Services the authority to take custody of former President Nixon's presidential papers and tape recordings, the Supreme Court noted that there was "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch." *Nixon v. Administrator of General Services,* 433 U.S. 425, 445 (1977). Citing FOIA and the Federal Records Act, the Court stated that "[s]uch regulation of material generated in the Executive Branch has never been considered invalid as an invasion of its autonomy." *Id.*

The Government's request that we rule the NSC exempt from FOIA on the basis of broad, general allegations of unconstitutional intrusion has no foundation in precedent. We have suggested that such broad constitutional attacks are inappropriate if in particular contexts steps might be taken to

avoid undue intrusions on the executive branch. In *Pacific Legal Foundation,* we rejected the Government's argument that applying the Government in the Sunshine Act to the Council on Environmental Quality would violate constitutional principles of separation of powers. We explained:

> The constitutional issues . . . are posed in an abstract context that is inappropriate for their adjudication. It may be that by closing certain meetings, the Council could avoid possible constitutional problems. We apply the settled rule that federal courts "will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'"

Pacific Legal Found., 636 F.2d at 1265 (quoting *Ashwander v. Tennessee Valley Auth.,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). The record contains no evidence that the conduct of foreign affairs or national security preparedness under Presidents Ford, Carter, Reagan, and Bush, or indeed during the first year of the Clinton Administration, suffered from FOIA compliance. Consistent with our approach in *Pacific Legal Foundation,* we could hold the NSC subject to FOIA with the understanding that the Government is free to raise another day constitutional objections to subjecting particular documents to the requirements of that statute. *Cf. Nixon,* 433 U.S. at 443 ("[I]n determining whether the [Presidential Recordings and Materials Preservation] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." (citation omitted)).

Even were it appropriate for us to entertain the Government's broad attack on applying FOIA and the Federal Records Act to the NSC, the Government's case would be weak. Because FOIA exempts from its coverage materials classified "in the interest of national defense or foreign policy,"

5 U.S.C. § 552(b)(1)(A), as well as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency," § 552(b)(5), applying FOIA to the NSC presents little risk of improper intrusion into the President's exercise of his constitutional responsibilities. Indeed, the broad applicability of the national security exemption to NSC records likely explains the NSC's ready compliance with FOIA for nineteen years under Presidents Ford, Carter, Reagan, and Bush. In addition to the FOIA exemptions of national security materials and discovery-immune documents, my suggested exemption of certain documents of NSC officials holding separate positions, such as in the Office of the President or the Office of the Vice President, *see supra* Part II, provides further assurance that subjecting the NSC to the requirements of FOIA and the Federal Records Act will not intrude impermissibly into the President's interactions with his closest advisors. Under the holding I recommend, the President would be perfectly free to have FOIA-exempt interactions with his Assistant for National Security Affairs. Indeed, the Office of Legal Counsel of the Department of Justice concluded in 1978 that subjecting the NSC to FOIA would not unconstitutionally intrude upon the President or the NSC:

> [D]ue to the nature of the work of the NSC and its staff it is clear that valid exemptions are available for the vast bulk of the material which constitutes NSC records....
>
> We have also considered whether NSC could raise a valid constitutional claim to general immunity from the FOIA, and we believe this possibility is very weak. Certain records of the NSC could, if necessary, be protected by a claim of executive privilege, but such a claim could not successfully be invoked to preclude Congress from opening to public view some NSC administrative records and other nonsensitive records to which the claim could not reasonably attach. Nor could it be shown on evidence now available that the Act's impact on NSC is so onerous that its ability to function in support of the President will be impaired.

2 Op. Off. Legal Counsel at 205 n.15, *withdrawn*, Memorandum from Walter Dellinger to Alan J. Kreczko (Sept. 20, 1993).

Presumably in recognition of Congress's authority to preserve documents of the United States Government, including the executive branch, the Government does not assert that the Presidential Records Act represents an unconstitutional intrusion upon the President's exercise of his constitutional duties. Consequently, the Government's challenge to application of FOIA and the Federal Records Act to the NSC must hinge upon the differences between the burdens imposed by the Presidential Records Act on the one hand and the Federal Records Act and FOIA on the other. In my view, the differences are insufficient to sustain the Government's constitutional claim.

First, in light of Congress's broad authority over executive branch documents, *see Nixon*, 433 U.S. at 445, little rests on the Federal Records Act's more demanding procedures to prevent destruction or unauthorized taking of documents, *see* 44 U.S.C. §§ 3303, 3303a. Leaving for another day the possibility that executive privilege might entitle the President to keep or destroy *particular* documents, I think the Government has failed to offer any persuasive reason to hold that Congress is without power to subject nonsensitive NSC documents to the Federal Records Act.

Second, the Government argues that although the Presidential Records Act makes records available under FOIA procedures, it gives the President the power to specify a period of time, not to exceed twelve years, during which the materials will not be available, *see* 44 U.S.C. § 2204(a), thereby allowing the President while in office to avoid the supposedly intrusive effects of FOIA and the Federal Records Act. The risk of serious intrusion, however, is slight in view of existing FOIA exemptions and the President's ability to have non-NSC interactions with his Assistant for National Security Affairs and other NSC officials who hold separate, purely advisory, non-NSC positions. Furthermore, the timing differences between the Presidential Records Act and the Federal Records

Act must be viewed together with other differences that make the former more burdensome than the latter in certain respects. In particular, under the Presidential Records Act, certain materials that are altogether exempt from FOIA—specifically, memoranda or letters not subject to discovery in litigation—are available under the Presidential Records Act using FOIA procedures. *See* 5 U.S.C. § 552(b)(5); 44 U.S.C. § 2204(c)(1).

Finally, the differences in the statutes' provisions for judicial review cannot sustain the Government's constitutional claim. Although judicial review is not available for compliance with the requirements of the Presidential Records Act as it is under the Federal Records Act, *see Armstrong v. Bush*, 924 F.2d 282, 297 (D.C. Cir. 1991) (*Armstrong I*), judicial review of presidential guidelines describing which materials are presidential records is available even under the Presidential Records Act, *see Armstrong II*, 1 F.3d at 1292-94. The Government has offered no convincing rationale for holding unconstitutional the application of the judicial review provisions of FOIA and the Federal Records Act to the NSC—as opposed to other EOP units that advise and assist the President in addition to exercising substantial independent authority, or as opposed to other executive agencies involved in sensitive foreign affairs issues yet subject to FOIA, such as the Department of State and the Central Intelligence Agency.

IV.

I would thus conclude that the NSC is an agency for purposes of FOIA and the Federal Records Act and that the Constitution presents no bar to subjecting the NSC to these statutes. I dissent.

SCOTT ARMSTRONG, et al., Plaintiffs,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, et al., Defendants.

Civil Action No. 89-142 (CRR)

United States District Court,
District of Columbia
February 14, 1995

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JUDGES: CHARLES R. RICHEY,
UNITED STATES DISTRICT

OPINION: MEMORANDUM OPINION OF
CHARLES R. RICHEY,
UNITED STATES DISTRICT JUDGE

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INTRODUCTION

Despite a long history of acting as an "agency," and after admitting it was an agency, and thus subject to the Federal Records Act in this litigation, and notwithstanding a long practice of processing records pursuant to the Freedom of Information Act, the President and the Executive Secretary of the National Security Council suddenly changed course in 1994 declaring that the National Security Council is not an agency and thus not subject to the Federal Records Act. (Copies of the declarations are attached hereto and made a part hereof as Exhibit A, Mem. of President Clinton on "Access to NSC Records" dated March 24, 1995, and Exhibit B, Mem. of William H. Itoh, National Security Council Executive Secretary, on "Instructions on Presidential Status of the National Security Council and Revised Disclosure and Disposition Policy" dated March 25, 1994). In doing this on March 24 and 25, 1994, (See Exhibits A and B), the Defendants would have the Court ignore the facts that the National Security Council ("NSC") performs rulemaking and adjudication and functions independently of the President in many areas. Moreover, the NSC has operated as an agency, subject to the Freedom of Information Act, which requires that it must maintain and preserve its records in accordance with the Federal Records Act.

In particular, the Defendants contend that the NSC it not an agency, because its sole function is to advise and assist the President. The Court finds, however, that this contention is incorrect because the NSC performs traditional agency functions and operates independently of the President in many areas. Moreover, their contention that this decision will intrude on the exercise of Presidential powers and responsibilities is also wrong because Congress, in enacting the Freedom of Information Act ("FOIA"), specifically provided that material relating to national security shall not be disclosed.

In this case, the Plaintiffs claim that the Defendants are barred from asserting that the NSC is not an agency, because the Defendants conceded that it is an agency in the two prior

Court of Appeals' opinions. *See Armstrong v. Bush*, 288 U.S. App. D.C. 38, 924 F.2d 282 (D.C.Cir. 1991); *Armstrong v. Executive Office of the President*, 303 U.S. App. D.C. 107, 1 F.3d 1274 (D.C.Cir. 1993). In addition, the NSC has stated that:

> The NSC does acknowledge that documents received or created pursuant to the inter-agency process of the NSC are agency records for the purposes of the FOIA (Joint Statement of Facts ¶ 171 (December 8, 1992)).

The Plaintiffs also claim that the NSC is an agency because the NSC is an establishment in the Executive Branch that exercises authority independently of the President by performing adjudicatory and rulemaking functions and by performing duties in many key areas. Last, the Plaintiffs assert that a finding by the Court that the NSC is an agency does not raise any constitutional concerns because the FOIA exempts from disclosure documents that relate to sensitive national security matters.

Upon a careful consideration of the facts of this case, the Court concludes that the NSC is an agency, subject to the FOIA, and that it must maintain and preserve its records in accordance with the Federal Records Act, except when high level officials of the NSC are acting solely in their capacity to advise and assist the President. Consequently, the Court shall declare the NSC's recently changed guidelines[2], classifying its records as "Presidential" Records, contrary to history, past practice and the law. (A copy of the old guidelines that were revoked by the March 25, 1994 declaration is attached hereto and made a part hereof as Exhibit B). Moreover, the Archivist shall be directed to perform her obligations with respect to NSC records under the Federal Records Act and to do so without any

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[2] Although the guidelines have also been labeled as "guidance," the Defendants offer no definitive explanation that there is a difference between the terms "guidelines" and "guidance." (Tr. of Motions Hearing at 66 PP 15-25 (November 16, 1994)). Therefore, the Court shall refer to them as "guidelines" having the force of law.

further delay as this case is important to the nation and the very credibility of this and future administrations.

PROCEDURAL HISTORY

This case was filed in 1989 at the close of President Reagan's Administration by journalist Scott Armstrong, the National Security Archive and several other individuals and organizations claiming, inter alia, that the President, the Archivist, and the NSC's recordkeeping practices failed to comply with the Federal Records Act and the Presidential Records Act.

That same year, this Court held as a preliminary matter that the President's and the NSC's compliance with the Federal Records Act and the Presidential Records Act was judicially reviewable. Armstrong v. Bush, 721 F. Supp. 343 (D.D.C. 1989). However, since there were some unresolved factual issues with respect to the Defendants' compliance with those recordkeeping statutes, this Court denied the Defendants' Motion to Dismiss the Complaint, or in the alternative for Summary Judgment, and allowed the parties to proceed with discovery. *Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989). At that stage in the litigation, the Court did not address the substantive question of whether the NSC's recordkeeping guidelines appropriately distinguished between Federal and Presidential Records.

On appeal, the Court of Appeals for this Circuit affirmed this Court's ruling by agreeing that the adequacy of the NSC's recordkeeping guidelines was judicially reviewable pursuant to the Federal Records Act. *Armstrong v. Bush*, 288 U.S. App. D.C. 38, 924 F.2d 282, 291-93 (D.C. Cir. 1991). However, the Court of Appeals remanded for a further development of the record to determine whether the NSC's electronic recordkeeping guidelines were consistent with law. *Id.*

This Court on remand[3] ruled on January 6, 1993, *inter alia*, that the Executive Office of the President's management of their electronic records violated the law because not all the pertinent information from the electronic records was being saved on hard copy or paper. *Armstrong v. Executive Office of the President*, 810 F.Supp. 335, 341-42 (D.D.C. 1993).

Thereafter, another appeal was taken in which the Court of Appeals for this Circuit held that the NSC's guidelines that initially categorize its records as either a Federal Record or a Presidential Record were judicially reviewable and, accordingly, remanded to this Court to determine whether the NSC's recordkeeping guidelines inappropriately classify some documents as Presidential Records rather than Federal

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[3] Prior to this Court's ruling on remand, the Defendants amended their Complaint. The new Complaint dropped the President as a Defendant and added, *inter alia*, the Executive Office of the President as a Defendant. (See Third Amended Compl. PP 13-15).

Records[4]. *Armstrong v. Executive Office of the President*, 303 U.S. App. D.C. 107, 1 F.3d 1274, 1278, 1296 (D.C.Cir. 1993).

After the Court of Appeals' remand, President Clinton stated in a March 24, 1994 memorandum to Anthony Lake and William Itoh that he was advised of this case and the Government's legal position herein. (Exhibit A). Further,

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[4] In response to this Court's decisions and the Court of Appeals' affirmance, new recordkeeping guidelines were issued for the major components of the Executive Office of the President. (A copy of the guidelines is attached hereto and made a part hereof as Exhibit C; see also Letter from Jason R. Baron, Attorney, United States Department of Justice, to Michael E. Tankersley, Attorney, Public Citizen Litigation Group, dated July 15, 1994). These new guidelines cover the following major components of the Executive Office of the President: (1) the Office of Administration; (2) the Office of the United States Trade Representative; (3) the Office of Science and Technology Policy; (4) the Office of Management and Budget; (5) the Office of National Drug Control Policy; and (6) the Council on Environmental Quality. (Exhibit C).

Also in response to this litigation, the National Archives and Records Administration ("NARA") finally proposed new regulations applicable to all Federal agencies. 59 Fed. Reg. 13906 (March 24, 1994) (A copy of the proposed regulations is attached hereto and made a part hereof as Exhibit D). The NARA's proposed regulations prescribe the management of "Federal records created or received on an E-mail system." *Id.* Moreover, the proposed regulations apply to "all Federal government agencies." *Id.* (emphasis added).

The Court notes that the recent guidelines of the Executive Office of the President with respect to the Office of Administration, the Office of the Office of the President with respect to the Office of Administration, the Office of the United States Trade Representative, the Office of Science and Technology Policy, the Office of Management and Budget, the Office of National Drug Control Policy and the Council on Environmental Quality, and those of the NARA that were developed as a result of this litigation, are not now in dispute. (See, e.g., Stipulation and Order of January 27, 1994 at 13-14; Order of June 22, 1994).

President Clinton's memorandum directed, inter alia, that the NSC:

> Establish procedures for access by the public to appropriate NSC records of the current Administration.[5]

However, the next day, on March 25, 1994, NSC Executive Secretary William Itoh issued a written memorandum, which was not wholly consistent with what the President himself stated above. (Joint Statement of Facts ¶ 53; Exhibit B). Mr. Itoh stated that the NSC is not an "agency" and that all of its records are Presidential Records, and thus not subject to the FOIA. *Id.* Accordingly, the Defendants' memorandum asserts that the NSC may classify all of its records solely under the Presidential Records Act. *Id.*

STATEMENT OF THE QUESTION PRESENTED

Whether a government entity, namely the NSC, which has historically treated itself as an agency, and has engaged in a multitude of functions independently of "advising and assisting the President," just like other components of the Executive Office of the President, which admittedly are "agencies" subject to the Freedom of Information Act[6] and the Federal Records Act, can unilaterally after many years of treating itself as an agency, suddenly change its designation without offering a reasoned explanation for the sudden change, and thus declare that it is no longer an "agency?"[7]

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[5] The Court observes that from a plain reading of the President's own words, the President did not, in reality, act inconsistently with what the Court holds in this case. *(See Exhibit A).*

[6] From 1975 until March 25, 1994, the NSC subjected itself to the Freedom of Information Act. (See Exhibit B; and pages 31, 33, infra).

[7] The resolution of the status of the National Security Council will resolve counts II and III of the Plaintiffs' three count Complaint, (continued...)

If the NSC's declaration that it is not an "agency" is true, then it may classify all of its records solely as Presidential Records. On the other hand, if the Court finds that the NSC is an "agency," the NSC's documents would be subject to the FOIA and it would have to maintain and preserve its records in accordance with the Federal Records Act. Accordingly, the Archivist would be required to fulfill her duties as prescribed by the Federal Records Act.

This case is not a political question but one of statutory construction, and it is one requiring deference to a longstanding practice of an agency. It involves, *inter alia*, a sudden change in position that is not only contrary to law but without any reasoned explanation for the change. *See Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C.Cir. 1971), *cert. denied*, 403 U.S. 923, 29 L.Ed.2d 701, 91 S.Ct. 2233 (1971).

This Judge has the highest regard for the other two coordinate Branches of the Government and would not knowingly intrude on their power and the exercise of their constitutional duty. The same is true of this Court's respect for the institution of the Presidency including our current Commander-in- Chief and his predecessors. However, this is a country of laws and not of persons and no one including the President is above the law as set forth in the Constitution and laws of the States. This is also why we have independent Courts with the power of Judicial Review going back to *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803).

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[7](...continued)
wherein they assert that the Defendants' recordkeeping guidelines violate the Federal Records Act, and that the Archivist has failed to carry-out her duties under the Federal Records Act. (See Third Amended Compl. at PP 40-47). Count I is a claim under the Freedom of Information Act. Pursuant to prior stipulations and Court orders, (see, e.g. "Stipulation and Order" dated January 27, 1994), the Defendants are currently processing materials pertinent to the Freedom of Information Act claim. Thus, the Plaintiffs' claim under count I is not before the Court at this time.

To settle the matter in accordance with the Court of Appeals' remand, the parties filed the instant Cross-Motions to Dismiss, or, in the Alternative, for Summary Judgment,[8] Oppositions, and Replies thereto, which are now before the Court.[9] In light of the papers filed by the parties, the

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[8] Although the parties' briefs exceed the page limitations prescribed in the Local Rules, the parties filed along with their briefs, Motions to exceed the page limitations. To allow the parties an opportunity to fully brief their positions in this case, and in the interests of justice, the Court shall grant the Motions.

Moreover, the Court shall treat the parties' Motions as those for Summary Judgment for two reasons. First, the parties' Motions refer to matters outside the scope of the pleadings. According to Rule 12 of the Federal Rules of Civil Procedure, whenever "matters outside the pleading are presented the motion shall be treated as one for summary judgment." Fed. R. Civ. Pro. 12(b)(6). Second, as required by Local Rule 108(h), the parties have filed statements of material facts as to which there is no genuine issue.

[9] The Defendants also filed, on October 7, 1994, a Motion to Withdraw and Amend Prior Responses to Requests for Admissions wherein the National Security Council previously characterized some of its functions as that of an "agency," and asserted that the National Security Council is subject to both the Federal Records Act and the Freedom of Information of Act.

With respect to admissions, Rule 36(b) of the Federal Rules of Civil Procedure provides that:

> The court may permit withdrawal or amendment [of admissions] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. Pro. 36(b). According to the Rule, permission to withdraw is committed to the discretion of the Court. *See Id.*

In the exercise of its discretion and in the interests of justice, the Court shall deny the Motion because the Defendants filed this Motion *after* discovery was completed, *after* the Plaintiffs filed their

(continued...)

underlying law, the entire record herein, and oral argument, the Court shall grant the Plaintiffs' Motion for Summary Judgment, and deny the Defendants' Motion.

FACTS

Since the early 1980's, the NSC has used electronic mail systems to manage information. (Joint Statement of Facts at ¶ 42). All NSC staff members have access to these systems, which allow users electronically to transmit mail, generate calendars of appointments and meetings, create and edit memoranda, and transfer files and documents. These electronic communications systems contain organizational, functional, policy, procedural, and operational information regarding the NSC. When employing these electronic systems, NSC staff members are not instructed to distinguish between "Presidential" and "Federal" Records. (Responses of NSC to Plaintiffs' Requests for Admissions, RFA 1-11 at 61 (1994)). Copies of the information from these electronic systems are regularly copied onto "backup tapes," which contain information created during the Reagan, Bush, and Clinton administrations. (See Joint Statement of Facts ¶ 46 (October 3, 1994)). Currently, the "backup tapes" are being retained by the Defendants in accordance with previous Court-ordered injunctions. According to the NSC, since it is not an "agency" as defined in the Federal Records Act or the FOIA, the records created on these electronic systems are not agency records that would be subject to the Federal Records Act. (Exhibit B).

Notwithstanding the NSC's current declaration that it is not an agency, in previous pleadings filed with the Court, the NSC

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[9](...continued)
pleadings relying on the admissions, and after the parties entered into a joint statement of undisputed facts referring to the admissions. Also, to allow withdrawal of these admissions now would result in prejudice because discovery would have to be reopened to allow the Plaintiffs an opportunity to obtain evidence on the matters covered in the responses.

has stated that it performs the dual functions of advising and assisting the President, and performs independent functions. (Joint Statement of Facts ¶ 171 (December 8, 1992); see Exhibit B). Moreover, the Defendants have previously acknowledged that "documents received or created pursuant to the inter-agency process of the NSC are agency records for the purposes of the FOIA. " (Joint Statement of Facts ¶ 172 (December 8, 1992) (citing *Armstrong v. Bush*, 288 U.S. App. D.C. 38, 924 F.2d 282, 286 n.2 (D.C.Cir. 1991))).

A. The Recordkeeping Statutes

Prior to the NSC's March 25, 1994 declaration that it is not an agency, the NSC's recordkeeping guidelines distinguished between Federal and Presidential Records. *E.g., Armstrong v. Bush*, 288 U.S. App. D.C. 38, 924 F.2d 282 (D.C.Cir. 1991). The Federal Records Act ("FRA") governs a federal agency's duties with respect to managing Federal Records. According to the FRA, the head of each agency is to:

> Make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

44 U.S.C. § 3101. Moreover, agency heads are to "establish and maintain an active, continuing program for economical and efficient [records] management," and "establish safeguards against the removal or loss of records [the agency head] determines to be necessary and required by regulations of the Archivist." Id. at 3102, 3105. Records that are subject to the Federal Records Act are immediately subject to the FOIA. See 5 U.S.C. § 552. Further, recordkeeping guidelines promulgated under the FRA are subject to judicial review. Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 292-92 (D.C.Cir. 1991).

To dispose of a Federal Record, an agency must first garner the approval of the Archivist. The Archivist is vested with the duty to determine if a record is suitable for destruction by deciding if the record has "sufficient administrative, legal, research, or other value to warrant [its] continued preservation." 44 U.S.C. § 3303(a). Consequently, documents that qualify as a Federal Record are subject to specific guidelines and procedures in their management and disposal.

In contrast to Federal Records, the President has greater control over documents generated during his term of office that qualify as a Presidential record. See 44 U.S.C. § 2204. Under the Presidential Records Act ("PRA"):

> The President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records...

44 U.S.C. § 2203 (emphasis added).

The PRA further provides that the President may only dispose of his Presidential Records after he "obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential Records," and the Archivist consults with Senate and House Committees "with respect to any proposed disposal of Presidential Records." *Id.*

In addition, after the President leaves office, the PRA provides that:

> [T]he Archivist of the United States shall assume responsibility for the custody, control, and preservation of, and access to, the Presidential records of that President. The Archivist shall have an affirmative duty to make such records available to the public as rapidly and completely as possible consistent with the provisions of this Act. . . .
>
> [Moreover,] the Archivist is authorized to dispose of such Presidential records which he has appraised and determined to have insufficient administrative, historical, informational, or evidentiary value to warrant

> their continued preservation. Notice of such disposal shall be published in the Federal Register at least 60 days in advance of the proposed disposal date. Publication of such notice shall constitute a final agency action for purposes of review under chapter 7 of title 5, United States Code.

Id. In addition, before the conclusion of his term of office, the President is to specify a duration, "not to exceed twelve years, for which access shall be restricted with respect to information, in a Presidential Record." The restriction on access to Presidential Record material applies to certain categories of information contained in a Presidential Record, such as personnel and medical files, the disclosure of which would clearly constitute an unwarranted invasion of personal privacy, or information involving confidential advice between the President and his advisors, etc. 44 U.S.C. § 2204.

B. The Structure Of The National Security Council

The National Security Act of 1947 established the NSC. 50 U.S.C. § 402. Pursuant to the Reorganization Plan No. 4 of 1949, the NSC was transferred to the Executive Office of the President ("EOP"). As an entity within the EOP, the NSC has a separate budget and staff, and a firm structure.

From fiscal years 1983 to 1995, the NSC's budget has ranged from approximately $4,000,000 to $ 7,000,000. (See Budget of the United States Government (1985); Mem. from J. Robert Manzanares, Director of Administration, to Robert S. Dotson, Chief, Air Force Branch of National Security Division Office of Management and Budget, entitled "FY 1995 Submission" (1993)). In fact, last week President Clinton transmitted his budget to Congress requesting $ 6,648,000 for the operation of the NSC. (Fiscal Year 1996 Budget Submission (February, 1995)).

Pursuant to the National Security Act of 1947, the NSC has its own staff, consisting of approximately one hundred fifty individuals drawn from various executive departments and agencies, and from outside the government. (Defs.' Resp. and

Supplemental Resp. to Inter. No. 2). Internal documents created before March, 1994, state that the NSC staff acts as members of an agency. (Letter from Stephen J. Rademaker, NSC Deputy Legal Adviser, to Mark M. Richard, Deputy Assistant Attorney General, United States Department of Justice (August 26, 1992); NSC Mem. on "United States of America v. Caspar Weinberger" (1992)).

With respect to its structure, the NSC, pursuant to various Presidential Directives, is divided into a three-tiered system of committees or groups consisting of: (1) a principals' committee; (2) a deputies' committee; and (3) interagency working groups.

Various statutes, regulations, Executive Orders and Directives prescribe the functions that the NSC performs independently of the President, such as rulemaking and adjudication, and its role in specific policy areas. E.g., National Security Act of 1947 § 102, et seq.; Exec. Order No. 12,333, 46 Fed. Reg. 59942 (1981); National Security Decision Directive 65 (1982).

DISCUSSION

This case comes before the Court on Cross-Motions for Summary Judgment. Summary judgment shall be rendered upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 89 L.Ed.2d 538, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986); *Frito-Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1032 (D.C.Cir. 1988). For the reasons set forth below, the Court shall grant Summary Judgment in favor of the Plaintiffs.

I. THE "LAW OF THE CASE" DOCTRINE DOES NOT BAR THE COURT FROM DECIDING THE STATUS OF THE NSC BECAUSE THE ISSUE HAS NOT BEEN PREVIOUSLY DECIDED.

Before the Court can address the gravamen of this dispute, to wit, whether the NSC is an agency, it must first respond to the Plaintiffs' contention that since the NSC has not previously challenged the two prior Court of Appeals' cases allegedly acknowledging that the NSC is an agency, this Court is now barred from deciding the issue under the "law of the case" doctrine.

> The "law of the case" doctrine states that:
>
> [A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case and the parties are deemed to have waived the right to challenge that decision at a later time.

Palmer v. Kelly, 305 U.S. App. D.C. 137, 17 F.3d 1490, 1494 (D.C.Cir. 1994); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 258 U.S. App. D.C. 124, 810 F.2d 243, 250 (D.C.Cir. 1987) (internal citation omitted). However, if an issue has not previously been decided, the "law of the case" doctrine does not apply. *Quern v. Jordan*, 440 U.S. 332, 347 n.18, 59 L.Ed.2d 358, 99 S.Ct. 1139 (1979) (citing *In re Sanford Fork Tool Co.*, 160 U.S. 247, 40 L.Ed. 414, 16 S.Ct. 291 (1895)); *see Friends of the Earth v. Reilly*, 296 U.S. App. D.C. 170, 966 F.2d 690, 696 n. 7 (D.C.Cir. 1992). Contrary to the Plaintiffs' arguments, the Court finds that since the issue of the NSC's status has not been decided in the two prior Court of Appeals' decisions, the "law of the case" doctrine does not apply to the instant case, and therefore, this Court is not precluded from deciding the issue.

The first appeal, *Armstrong v. Executive Office of the President*, 288 U.S. App. D.C. 38, 924 F.2d 282 (D.C.Cir. 1991), did not decide the issue because the question of whether the NSC is an "agency," subject to the FOIA, first arose only

after the Court of Appeals' decision. (See Pls.' Opp'n to Defs.' Mot. for Summ.J. at 50-56 (July 6, 1992)).

Likewise, the Court of Appeals in *Armstrong v. Executive Office of the President*, 303 U.S. App. D.C. 107, 1 F.3d 1274 (D.C.Cir. 1993), the second appeal, did not decide the issue either. In remanding back to this Court, the Court of Appeals in that case specifically stated that the issue of the NSC's status as an agency "has never been definitely resolved." *Id.* at 1296.

Since the NSC's status as an "agency" has never been previously decided, the Court finds that the "law of the case" doctrine does not bar this Court's determination of the issue.

The Court shall now turn to the merits of the instant dispute.

II. THE COURT FINDS THAT THE NSC IS AN AGENCY BECAUSE THE NSC IS AN ESTABLISHMENT IN THE EXECUTIVE BRANCH AND EXERCISES SUBSTANTIAL INDEPENDENT AUTHORITY SUCH THAT IT DOES NOT SOLELY RENDER ADVICE AND ASSISTANCE TO THE PRESIDENT.

To be an agency, an entity must satisfy a two pronged analysis. First, an entity must be an "establishment in the executive branch." 5 U.S.C. § 552(f). Second, the entity must exercise "substantial independent authority" to the extent that its role is not limited solely to giving advice and assistance to the President. *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C.Cir. 1970); *see* 5 U.S.C. § 551(1) and 552(f).

In the instant case, the Court finds that both prongs of the agency test are met as applied to the NSC.

A. The NSC Meets The First Prong Of The Agency Test Because It Is An Establishment In The Executive Branch That Has A Separate Staff And A Firm Structure.

According to the law of this Circuit, an entity that has a separate staff and a firm structure is an "establishment in the executive branch" and, therefore, meets the first prong of the agency test. *Meyer v. Bush*, 299 U.S. App. D.C. 86, 981 F.2d 1288, 1293, 1295-96 (D.C.Cir. 1993). In examining the nature

of the NSC, the Court concludes that since the NSC has a separate staff and a firm structure, it is an establishment in the executive branch.

First, the NSC by statute was provided with a separate staff. 50 U.S.C. § 402(c) (the NSC "shall have a staff"). In fact, during the past three Presidential administrations, there have been approximately one hundred fifty individuals on the NSC staff. (Defs.' Resp. and Supplemental Resp. to Inter. No. 2).

Second, the NSC has a firm structure. The NSC was created by the issuance of an affirmative statutory mandate when Congress stated that "there is established a council to be known as the National Security Council." 50 U.S.C. § 402(a). In its current set-up, the NSC has twenty-five separate interagency working groups operating within its structure and, as indicated by the NSC's organizational chart, the NSC staff is organized into separate offices responsible for particular regions or functions. In addition, the NSC contains multiple "interagency working groups" that report to the NSC. (Joint Statement of Facts ¶ 23). Finally, the Court notes that the NSC has a separate budget, which now totals in excess of $ 6,000,000. (See Budget of the United States Government (1985); Mem. from J. Robert Manzanares, Director of Administration, to Robert S. Dotson, Chief, Air Force Branch of National Security Division Office of Management and Budget, entitled "FY 1995 Submission" (1993)).

Since the NSC has a separate staff and a firm structure, as indicated by the foregoing facts, the Court concludes that the NSC is an "establishment in the executive branch" and, therefore, satisfies the first prong of the agency test.

B. The NSC Meets The Second Prong Of The Agency Test Because It Exercises Substantial Independent Authority Through The Performance Of The Traditional Agency Tasks Of Rulemaking And Adjudication, And Because It Performs Many Functions Independently Of The President.

The second prong of the agency test was established by this Circuit in *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C.Cir. 1970). In that case, the Court of Appeals had to decide whether the Office of Science and Technology ("OST") is an agency subject to the FOIA. *See Id.* at 1070-71. The Court held that despite the fact that the OST advised and assisted the President, it is an agency because it performed additional independent functions. *Id.* at 1074.

In finding the OST to be an agency, the Court of Appeals developed what has become known as the "sole function" test. According to this test, the second prong of the agency test, an entity that exercises substantial independent authority aside from advising and assisting the President is an agency. *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067 (D.C.Cir. 1970); *see* 5 U.S.C. 552(f) (citing 5 U.S.C. 551(1)).

It is undisputed that the "sole function" test applies to the instant case. (Defs.' Mot. for Summ. J. at 33-34). The Defendants contend, however, that under that test, the NSC's sole function is to advise and assist the President. *Id.* at 40-53. The Court finds that the Defendants are simply incorrect.

1. The NSC Performs The Traditional Agency Functions Of Rulemaking And Adjudication.

First, because the NSC performs rulemaking and adjudication, it exercises authority independently of the President, the NSC satisfies the sole function test. Under the Administrative Procedure Act ("APA"), entities that perform rulemaking and adjudicatory functions are considered agencies. See 5 U.S.C. 551, 553, 554. A close examination of the facts of this case indicates that the NSC performs the same

adjudicatory and rulemaking functions that are indicative of a classic "agency" under the APA.

In publishing its regulations in the Code of Federal Regulations, the NSC has performed rulemaking. By statute, only the regulations that become published in the Code of Federal Regulations are considered agency documents that have "legal effect." 44 U.S.C. § 1510(a). Consequently, regulations that become published in the Code of Federal Regulations are presumptively deemed rules of an agency. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 254 U.S. App. D.C. 242, 796 F.2d 533, 539 (D.C.Cir. 1986) (Scalia, J.); *accord American Mining Congress v. Mine Safety & Health Admin.*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1109, 1112 (D.C.Cir. 1993). In this case, the NSC has performed rulemaking by issuing many regulations that have been subsequently published in the Code of Federal Regulations.

The NSC has, several times, issued regulations governing procedures for requesting information that were published in the Code of Federal Regulations. *See generally*, 32 C.F.R. 2101-2103. Moreover, in conjunction with the Office of Science and Technology Policy, the NSC has issued regulations, published in the Code of Federal Regulations, governing national security and emergency preparedness. 47 C.F.R. §§ 201- 216. Last, pursuant to an Executive Order, the NSC has issued a circular prescribing the procedures for handling telecommunications systems, which has also been published in the Code of Federal Regulations. *See* 47 C.F.R. § 213.1(b).

In addition to numerous rulemaking functions, the NSC also performs various adjudicatory functions. With respect to the declassification of national security information, the NSC is empowered to review and overturn declassification decisions made by other agencies. Exec.Order No. 12,356, 47 Fed. Reg. 14879 (1982); 22 C.F.R. § 9.16. With respect to the FOIA, the FOIA regulations of other agencies require that requests for NSC or White House documents be referred to the NSC for review and determination. 32 C.F.R. §§ 286.7; 518.26; 701.8(i). In accordance with this authority, the NSC staff adjudicate

approximately 1,500 FOIA and mandatory review requests each year. (Dep. of David Van Tassel, NSC Director or Access Management at 23-34, ¶¶ 19-18). In addition, the NSC staff has primary and authoritative review responsibility regarding FOIA requests for material classified and maintained by the NSC, by the President, or by his staff where there is an NSC interest. 32 C.F.R. § 2101.41(a)(1). With respect to government security agreements, the NSC reviws and approves the language used in the agreements in order to protect classified information. *See* 32 C.F.R. § 2003.20; 48 Fed. Reg. 40849. Moreover, the NSC makes decisions on export license applications that raise nuclear non-proliferation or national security issues. *See* 56 Fed. Reg. 6701.

As the above facts indicate, the NSC performs the classic agency functions of rule-making and adjudication. In performing such functions, the NSC exercises authority independelty of the President and thereby satisfies the sole function test.

2. The NSC Exercises Substantial Authority Independently Of the President In Key Policy Areas.

In addition to satisfying the sole function test by performing the traditional agency functions of rulemaking and adjudication, the NSC also satisfies the test by virtue of its role in many different policy areas. As required by the sole function test, the NSC in each of these areas operates independently of the President.

First, the NSC plays a role in Intelligence independent of the President. By statue, the NSC is the head of the Central Intelligence Agency ("CIA"). National Security Act of 1947, ch. 343, Pub.L. 253 (1947). According to the statute, the CIA is "to perform such ... functions and duties ... affecting the national security as the National Security Council may from time to time direct." *Id.* More importantly, pursuant Executive Order, the NSC is "the highest Executive Branch entity that provides review, guidance, and direction to the conduct of all national foreign intelligence, counter-intelligence, special

activities, and attendant policies and programs." Exec.Order No. 12,333, 46 Fed.Reg. 59942 (1981).

Second, the NSC plays a role in protecting National Security Information independent of the President. In the area of national security, an information security program governs the responsibilities of federal agencies with respect to classifying, declassifying and safeguarding sensitive national security information. Exec.Order No. 12,356, 47 Fed. Reg. 12881 (1982). The NSC is charged with providing "overall policy direction" for this program. *Id.* Furthermore, the NSC is responsible for providing overall policy direction for a National Industrial Security Program, which controls the release of classified information to contractors. Exec.Order No. 12,829. Also, the NSC reviews regulations governing other agencies' security practices, and conducts nearly 1,000 mandatory declassification reviews. *See Id.* (Dep. of David Van Tassel, NSC Director of Access Management at 23-24 ¶¶ 19-18).

Moreover, the NSC plays a role in Telecommunications independent of the President. In 1963, the President established a National Communications System to link the communication facilities of the federal agencies and to conduct planning necessary to provide communications in national emergencies. (President Kennedy's "Memorandum to the Heads of Executive Departments and Agencies" (1963)). Pursuant to an Executive Order, the NSC was given the responsibility for directing, coordinating, and developing policies and programs of the National Communications System. Exec. Order No. 12,046. By virtue of a 1990 Directive, an NSC committee is responsible for federal policies with respect to telecommunications systems. National Security Directive (1990).

Furthermore, an Executive Order and various Directives have vested the NSC with overall responsibility for a national security emergency preparedness policy. *See* Exec. Order No. 12,656; National Security Directive 47 (1982); National Security Decision Directive 314 (1988).

In addition, the NSC plays a role in Arms Control Verification independent of the President. Under President Reagan, the NSC was responsible for monitoring arms control

compliance and overseeing START and INF verification programs. National Security Decision Directive 65 (1982). Under President Bush, NSC committees were to provide guidance to United States' inspection teams and to "coordinate verification research and development efforts." (NSC Mem. on "Verification Technology Working Group" (1990)).

The NSC also plays a role in Nonproliferation independent of the President. An NSC sub-group is responsible for reviewing any export licenses that propose export items that potentially involve nuclear explosives. 42 U.S.C. § 2139a(c). Interagency disputes over such licenses are resolved through the use of NSC procedures. 56 Fed.Reg. 6701 § 5.a(ii) (1991). Further, pursuant to a National Security Directive, the NSC reviews export licenses concerning no proliferation policy when requested by another agency. National Security Directive 53.

Finally, the NSC plays a role of Public Diplomacy independent of the President. The NSC coordinates and directs international broadcasting of public affairs to generate support for national security objectives. (NSC Mem. on "NSDD-77 on Public Diplomacy" (1985)). In addition, the NSC provides "aid, training and organizational support for foreign governments and private groups." *Id.*

As the above facts indicate, the NSC exercises substantial authority independently of the President. Accordingly, under the sole function test, the Court finds that the NSC is an agency.

III. THE COURT'S FINDING THAT THE NSC IS AN AGENCY FOLLOWS THIS CIRCUIT'S PRECEDENT.

This Circuit has, several times, applied the *Soucie v. David* sole function test to other entities within the Executive Office of the President and found them to be agencies. *See, e.g., Sierra Club v. Andrus*, 189 U.S. App. D.C. 117, 581 F.2d 895 (D.C.Cir. 1978), *rev'd on other grounds*, 442 U.S. 347, 60 L.Ed.2d 943, 99 S.Ct. 2335 (1979); *Pacific Legal Found. v.*

Council on Envtl. Quality, 205 U.S. App. D.C. 131, 636 F.2d 1259 (D.C.Cir. 1980).

In *Sierra Club*, the Court of Appeals held that although the Office of Management and Budget assists the President, it is an agency because it performs additional tasks as well, such as preparing the Budget for Congress. *Sierra Club*, 581 F.2d at 902.

Two years later, in *Pacific Legal Foundation*, the Court of Appeals held that the Council on Environmental Quality was an agency. *Pacific Legal Found.*, 636 F.2d at 1263. Although the Council advised the President, it was found to be an agency because, pursuant to Executive Orders, it had additional authority to evaluate federal programs. *Id.*

As indicated by *Soucie, Sierra Club* and *Pacific Legal Foundation*, the Court need only find that an entity perform one additional role beyond rendering advice and assistance to the President in order to declare that an entity is an "agency." In this case, it is obvious that the NSC does more than render advice and assistance to the President. In fact, this case is even easier to decide than the aforementioned Court of Appeals' decisions. Where those prior Court decisions found entities within the EOP to be agencies on the basis of just one or more additional functions beyond advising and assisting the President, the NSC, in this case, exercises authority independently of the President in numerous areas.

Nevertheless, despite the facts of this case and the legal precedent of this Circuit, the Defendants argue that the NSC is not an agency, but rather an "alter ego" of the President, in view of such cases as *Meyer v. Bush*, 299 U.S. App. D.C. 86, 981 F.2d 1288 (D.C.Cir. 1993).[10] In *Meyer*, the Court found

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[10] The Defendants also argue, incorrectly, that *Rushforth v. Council of Economic Advisers*, 246 U.S. App. D.C. 59, 762 F.2d 1038 (D.C. Cir. 1985), is controlling. In that case, the Court of Appeals held, in applying the sole function test, that the Council of Economic Advisers was not an agency. Id. at 1040, 1041-43.

(continued...)

that then-President Reagan's Task Force on Regulatory Relief was not an agency because of various factors. In particular, the Court noted that because the Task Force did not direct anyone, did not have substantial independence, was not expected to resolve disputes, and lacked a separate staff, it was not an independent entity. *Id.* at 1292-95.

However, this case is readily distinguishable from *Meyer* for several reasons. First, the Task Force in *Meyer* was established by the President acting alone. *Id.* at 1289. The NSC, however, was created by statute. 50 U.S.C. § 402(a). Thus, the President has no authority to eliminate, *sua sponte*, the NSC. Second, crucial to the *Meyer* Court's decision was a finding that the Task Force did not have a separate staff. *Meyer*, 981 F.2d at 1295. In contrast, the NSC, by statute, was provided with a separate staff. 50 U.S.C. § 402(c). More importantly, the Task Force in *Meyer* was also found not to be an agency, in part, because it was not expected to resolve disputes without presenting the disputes to the President directly. *Meyer*, 981 F.2d at 1294. However, the NSC has independent adjudicatory powers. As indicated *supra*, the NSC adjudicates in many areas such as declassification determinations, export licensing, and FOIA requests without the participation of the President.

Because the NSC was created by statute, has a separate staff, and exercises independent adjudicatory power, the NSC is unlike the Task Force in *Meyer* and, instead, is like the entities in *Sierra Club* and *Pacific Legal Foundation* that were found to be agencies. Thus, according to this prior precedent, the NSC is an agency.

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[10](...continued)

However, *Rushforth* is clearly inapplicable to the instant case because the Council in *Rushforth* was found not to be an agency, in part, because of its inability to issue regulations. Id. at 1043. In contrast, the NSC, in performing its rulemaking functions, described supra, has issued regulations. Therefore, the instant case is distinguishable from *Rushforth*.

IV. IN FINDING THAT THE NSC IS AN AGENCY, SUBJECT TO THE FOIA, THE COURT HOLDS THAT THE NSC MUST MAINTAIN AND PRESERVE ITS RECORDS IN ACCORDANCE WITH THE FEDERAL RECORDS ACT, EXCEPT WHEN HIGH LEVEL OFFICIALS OF THE NSC ACT SOLELY TO ADVISE AND ASSIST THE PRESIDENT. IN THAT LIMITED CIRCUMSTANCE, THE PRA, RATHER THAN THE FRA SHALL APPLY.

In deciding this case, the Court finds that in holding that the NSC is an agency, it must give affect to both the FRA and the PRA.[11] The FRA consists of a series of statutes, starting in 1943 with the Disposal of Records Act, ch. 192, 57 Stat. 380, and in 1950 with the Federal Records Act, ch. 849, 64 Stat. 583. Subsequently, these acts were amended by the Government Records Disposal Amendments of 1970, 84 Stat. 320, the Federal Records Management Amendments of 1976, 90 Stat. 2723, and the National Archives and Records Administration Act of 1984, 98 Stat. 2280. *See Armstrong v.*

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[11] The Court observes that the issue of whether the NSC may maintain records under both the FRA and the PRA was left open by the Court of Appeals in remanding this case to the Court. *See Armstrong v. Executive Office of the President*, 303 U.S. App. D.C. 107, 1 F.3d 1274 (D.C.Cir. 1993). On the one hand, the Court of Appeals suggested that it had previously rejected the argument that certain records may not be subject to the FOIA when the NSC is acting in its capacity as an advisor to the President. *See Id.* at 1295 (citing *Ryan v. Department of Justice*, 199 U.S. App. D.C. 199, 617 F.2d 781 (D.C.Cir. 1980). On the other hand, the Court of Appeals also stated that this Court was to decide if the NSC's guidelines "inaccurately classify some documents as presidential records." *Id.* at 1296-97 (emphasis added). Accordingly, this Court may now decide whether the NSC should classify its records under both the FRA and the PRA.

Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 284 n.1 (D.C.Cir. 1991) (citing 44 U.S.C. 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*) Subsequent to the original passage of the FRA, the PRA was enacted in 1978. *See* 44 U.S.C. § 2201 *et seq.*

When faced with two statutes, the general rule is that a repeal by implication is dis-favored. *E.g., Morton v. Mancari*, 417 U.S. 535, 549- 50, 41 L.Ed.2d 290, 94 S.Ct. 2474 (1974); *United States v. Hansen*, 249 U.S. App. D.C. 22, 772 F.2d 940, 944 (D.C.Cir. 1985) (Scalia, J.), *cert. denied*, 475 U.S. 1045, 89 L.Ed.2d 571, 106 S.Ct. 1262 (1986). Accordingly, a court is to give affect to both statutes, unless the statutes conflict or Congress specifically indicates otherwise. *E.g., Morton*, 417 U.S. at 551 (1974); *see, e.g., Mail Order Ass'n of America v. United States Postal Serv.*, 300 U.S. App. D.C. 46, 986 F.2d 509, 515 (D.C.Cir. 1993). In examining both statues, the Court finds that in holding that the NSC is an agency, the Court must recognize both statutes as applied to the NSC.

First, the operation of the PRA and the FRA does not conflict because the statutes deal with different categories of records. Under the FRA, records that are subject to the Act are defined as:

> [D]ocumentary materials ... made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation as evidence of the activities of the Government or because of the informational value of data in them.

44 U.S.C. § 3301. In contrast, records subject to the PRA are defined as:

> [D]ocumentary materials ... created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. § 2201(2). Moreover, the PRA does not apply to "any documentary materials that are ... official records of an

agency." *Id.* at §2201(2)(B)(i). Since the PRA applies to non-agency records, while the FRA applies to agency records, the statutes have distinct applications and do not conflict.

Furthermore, Congress has not indicated that the passage of the PRA repealed the FRA. *See* 44 U.S.C. § 2201 *et seq.* Although the PRA was promulgated after the FRA, neither the legislative history nor the language of the PRA indicate any Congressional intent to overturn the FRA *Id.* Because the PRA did not repeal the FRA in its passage, and the statutes apply to different categories of records, the Court, under the settled law of the Circuit, must recognize the operation of both statutes as applied to the NSC. Thus, the PRA shall apply to the NSC in certain circumstances, in addition to the FRA.

Due to its unique duties, high level officials of the NSC sometimes act not as members of an agency but, solely as advisors to the President. *See, e.g.,* Exec.Order No. 12,333, 46 Fed. Reg. 59942 (1981). In fact, the NSC's previous recordkeeping guidelines recognized this distinction when they segregated records as Presidential and Federal. (Exhibit B). Thus, since the PRA applies to documents that are created by an individual whose "function is to advise and assist the President," 44 U.S.C. § 2201(2), the PRA must apply to NSC officials whenever they act solely to advise and assist the President. In all other circumstances the FRA shall apply to the NSC because it is an agency.

Accordingly, under the settled law of this Circuit and the actual practice of the NSC, the Court holds that the NSC is an agency, subject to the FOIA, that must maintain and preserve its records in accordance with the FRA. However, in the limited circumstance in which a high level official of the NSC acts solely to advise and assist the President, the PRA, rather than the FRA shall apply.

V. THE NSC HAS FAILED TO PROVIDE A REASONABLE EXPLANATION AS TO WHY IT HAS SUDDENLY DECLARED THAT IT IS NOT AN AGENCY.

Even if the NSC did not perform rulemaking and adjudication, and otherwise exercise substantial authority independently of the President, the Court would still have to set aside the agency's declaration that it is not an agency as arbitrary and capricious.

Whenever an agency changes its position or policy, the general rule is that the agency must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ." *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C.Cir. 1971), *cert. denied*, 403 U.S. 923, 29 L.Ed.2d 701, 91 S.Ct. 2233 (1971). The rule espoused by *Greater Boston* has been repeatedly applied in this Circuit. *See, e.g., Cross-Sound Ferry Services, Inc. v. I.C.C.*, 290 U.S. App. D.C. 39, 934 F.2d 327, 329 (D.C.Cir. 1991) (internal citations omitted). Thus, although an agency is free to alter its policies, it must give a satisfactory explanation as to why it has done so. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L.Ed.2d 443, 103 S.Ct. 2856 (1983); *National Audubon Soc'y v. Hester*, 255 U.S. App. D.C. 191, 801 F.2d 405, 408 (D.C.Cir. 1986); *see International Fabricare Inst. v. EPA*, 297 U.S. App. D.C. 331, 972 F.2d 384, 389 (D.C.Cir. 1992); *Federal Election Comm'n v. Rose*, 256 U.S. App. D.C. 395, 806 F.2d 1081, 1089 (D.C.Cir. 1986).

The Court observes that, while the aforementioned rule concerns judicial review of an agency's change in policy, the seminal issue in this case is whether the NSC is an agency at all. Nevertheless, the Court finds this basic principle of administrative law applicable to the instant case as the NSC has admitted to being, and has operated as, an agency prior to its declaration. In turn, the Court finds that the NSC has failed to give a satisfactory or reasoned explanation as to why it has altered its position regarding its recordkeeping practices by declaring that it is not an agency.

Since 1975, the NSC has operated as an agency by allowing its records to be FOIA accessible. (Exhibit B). Since that time, the NSC has processed hundreds of FOIA requests. (*See* Dep. of David Van Tassel, NSC Director of Access

Management at 23-24, ¶¶ 19-18). Moreover, the NSC has previously acknowledged that it is an agency. (Letter from Stephen J. Rademaker, NSC Deputy Legal Adviser, to Mark M. Richard, Deputy Assistant Attorney General, United States Department of Justice (August 26, 1992); NSC Mem. on "*United States of America v. Caspar Weinberger*" (1992); *see* Joint Statement of Facts ¶ 171 (December 8, 1992)).

Nevertheless, regardless of the NSC's prior admissions and past practice, on March 25, 1994, the NSC declared that it was not an agency and, therefore, could maintain all of its records solely under the Presidential Records Act. (Exhibit A, B). According to this declaration, all of the NSC's records would no longer be subject to the FOIA. *Id.* However, nowhere in the March 25, 1994 declaration is there a reasoned explanation as to the NSC's abrupt change in position. *See Id.* Under the settled law of this Circuit, the NSC must provide a reasoned explanation for this shift. Since the NSC has not done so here, its declaration that it is not an agency must be set aside as arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 39, 77 L.Ed.2d 443, 103 S.Ct. 2856 (1983).

VI. THE COURT'S FINDING THAT THE NSC IS AN AGENCY DOES NOT UNCONSTITUTIONALLY INTRUDE ON THE POWERS OF THE PRESIDENT, BECAUSE APPLYING THE FOIA TO THE NSC WOULD NOT CAUSE UNDUE DISCLOSURE OF SENSITIVE NATIONAL SECURITY DOCUMENTS.

The Defendants' final argument is that the Court can not find the NSC to be an agency subject to the FOIA, because such a finding would constitute an unconstitutional intrusion into the powers of the President over foreign and military affairs by causing undue disclosure of documents relating to national security. (Defs.' Mot. to Dismiss, or, in the alternative for Summ. J. at 58 (1994)). This is simply incorrect.

It is true that, in construing a statute, a court should avoid a construction that raises constitutional problems. *Public Citizen v. Department of Justice*, 491 U.S. 440, 466, 105 L.Ed.2d 377, 109 S.Ct. 2558 (1989). However, in construing the statute establishing the NSC, a finding that the NSC is an agency subject to the FOIA would not result in an unconstitutional intrusion into the powers of the President for several reasons.

First, the NSC has previously admitted to being an agency. (*See, e.g.*, Joint Statement of Material Facts ¶ 158 (1992)). Thus, the Defendants' argument, that there are constitutional concerns in finding that the NSC is an agency, when the NSC has previously admitted to being an agency, is disingenuous, at best.

Second, the NSC has processed many FOIA requests notwithstanding their current claim that subjecting the NSC to the FOIA would raise constitutional conflicts. In 1966, Congress enacted the FOIA. 5 U.S.C. § 552. Since 1975 until the March 25, 1994 declaration, the NSC has subjected itself to the FOIA. (Exhibit B (citing 32 C.F.R. § 2101.1, 40 Fed. Reg. 7316 (1975))). During those nineteen years, the NSC never asserted that subjecting itself to the FOIA creates constitutional problems.

More importantly, the FOIA itself prevents disclosure of sensitive national security documents, thereby protecting the President from any undue infringement on his authority over national security matters. In enacting the FOIA, Congress specifically provided for nine categories of information that would be exempt from disclosure. In particular, the FOIA exempts from disclosure information falling into any of the following categories: (1) national security; (2) internal agency rules; (3) material that is exempted by another federal statute; (4) trade secrets; (5) inter and intra agency memoranda; (6) personal privacy; (7) law enforcement records; (8) records of financial institutions; and (9) geological or geophysical information. 5 U.S.C. § 552(b)(1)-(9). With respect to the instant case, the FOIA specifically exempts from disclosure documents that relate to sensitive national security issues. 5 U.S.C. § 552(b)(1), (5). Indeed, counsel for the NSC has been

unable to name a single instance in which sensitive national security material was released under the FOIA after an agency's invocation of one of the FOIA exemptions. Therefore, because Congress has specifically provided that materials relating to national security affairs shall not be disclosed, the holding of this Court that the NSC is an agency will not interfere with the President's powers over foreign and military matters.

CONCLUSION

Based on the foregoing, the Court finds that the NSC is an agency subject to the FOIA, and is obligated to preserve all of its records in accordance with the Federal Records Act, except when high level officials of the NSC are acting solely in their capacity to advise and assist the President. The Court further finds that to the extent the NSC's current guidelines allow all of its records to be classified as "Presidential" records, the guidelines are contrary to law. The NSC and the Archivist must adopt new guidelines for the NSC in place of those vacated and nullified on March 25, 1994, so as to ensure that non-Presidential Records are preserved under the Federal Records Act and not destroyed under the guise of the Presidential Records Act.

Obviously, the Court, in issuing this Opinion, does not intend to require Presidential Records or documents, written or electronic, that are designed solely to advise and assist the President to be preserved except as required by the Presidential Records Act. Nevertheless, the Archivist and records personnel in the NSC have a duty to adopt guidelines ensuring that records under the Federal Records Act are preserved. The Court observes that since other components of the EOP have already adopted new guidelines, this will not impose any undue burden. Accordingly, the Archivist is hereby directed forthwith to

perform her obligations under the Federal Records Act with respect to the NSC's records. The Court shall issue an Order of even date herewith in accordance with this Memorandum Opinion.

Dated: February 14, 1995

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

ORDER

Upon careful consideration of the parties' submissions, the arguments of Counsel, the record in the case and the underlying law, and for the reasons articulated in the Opinion of the Court of even date herewith, it is, by the Court, this 14th day of February 1995,

ORDERED that the parties' Motion to exceed page limitations shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Defendants' Motion to withdraw and amend prior responses to Requests for Admissions shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Defendants' Motion for Summary Judgment shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Court hereby declares that to the extent the NSC's current recordkeeping guidelines classify all of its records as "Presidential," those guidelines are contrary to law and the Archivist is hereby directed to perform her obligations under the Federal Records Act; and it is

FURTHER ORDERED that the Court hereby declares that the NSC is an agency subject to the FOIA, within the meaning of the Federal Records Act, with the limited exception mentioned in the Court's Opinion of even date herewith, and the records created and received on the NSC's electronic communications systems shall be maintained and preserved in accordance with the Federal Records Act; and it is

FURTHER ORDERED that on or before 4:00 p.m. on February 27, 1995, the Executive Office of the President and the Archivist shall forthwith adopt new guidelines for the National Security Council, in place of those vacated and nullified on March 25, 1994, in accordance with the Court's Opinion issued on even date herewith; and it is

FURTHER ORDERED that Counsel for the parties shall appear before the Court at 2:00 p.m. on February 21, 1995, for

a Rule 16 status conference to discuss any and all remaining aspects of this case that need Judicial resolution.

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

EXHIBIT A

THE WHITE HOUSE

WASHINGTON

March 24, 1994

MEMORANDUM FOR ANTHONY LAKE
WILLIAM H. ITOH

SUBJECT: Access to NSC Records

I understand that the status of the National Security Council (NSC) under the Freedom of Information Act (FOIA) and the Presidential Records Act will be the subject of further litigation in the case of *Armstrong v. Executive Office of the President*. I further understand our position is that the NSC is an entity within the Executive Office of the President that exists solely to advise and assist me in the discharge of my constitutionally based responsibilities over the national security affairs of the United States. If this legal position prevails, I understand that one consequence is that NSC records would not, as a matter of law, be subject to disclosure under the Freedom of Information Act.

Notwithstanding this legal conclusion, I strongly support the policy of past Administrations of permitting public access to certain NSC records, and of leaving certain NSC records to the incoming Administration in order to ensure a smooth transition on national security matters. Therefore, to provide for continued access to NSC records and their appropriate disposition at the end of my Administration, I direct you to take the following steps:

1. Establish procedures for continued access by the public to those NSC records previously transferred by one Administration to another for transition and continuity purposes.

2. Establish procedures for access by the public to appropriate NSC records of the current Administration.

3. Develop a plan to provide copies of appropriate NSC records to the next Administration in order to provide for smooth transition and continuity of essential foreign policy and national security matters.

/s/
William J. Clinton

EXHIBIT B

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506
March 25, 1994
ACTION

MEMORANDUM FOR WILLIAM H. LEARY

FROM: WILLIAM H. ITOH

SUBJECT: Instruction on Presidential Status of the National Security Council and Revised Disclosure and Disposition Policy

A. Summary

The purpose of this memo is to direct you to revoke the National Security Council's existing FOIA guidelines, 32 C.F.R. § 2101 and simultaneously to issue voluntary disclosure guidelines consistent with President Clinton's memorandum to me and Tony Lake, dated March 24, 1994. The President's memorandum sets forth his instruction to provide for continued public access to NSC records that were left at the NSC by prior Administrations, to provide for public access to appropriate records of this NSC, and to transfer copies of appropriate NSC records to the next Administration.

This memo reflects that the NSC is an entity within the Executive Office of the President that solely advises and assists the President and therefore is not subject as a matter of law to the FOIA. However, the NSC's new voluntary disclosure policy is to provide that the NSC will continue to process pending FOIA requests, including during the pendency of the *Armstrong v. EOP* litigation, and will receive and process future document requests.

B. Prior NSC FOIA and Recordkeeping Practices

Since its inception, each administration has left behind certain records for the purpose of promoting continuity in national security matters. In recent years, such records have been filed and maintained separately. Previously, they were referred to as "institutional" records and, over time, they have to be searched in response to FOIA requests. In addition, such records have been disposed of according to the Federal Records Act, 44 U.S.C. § 3301.

Most NSC records have not been searched by NSC response to FOIA requests. These Presidential records have been transferred to the Presidential Library of the respective President upon completion of his term in office. Under the Presidential Records Act ("PRA"), which went into effect on January 20, 1981, Presidential records are ultimately subject to the FOIA, though not until at least five years after the end of an administration. On February 19, 1975, the National Security Council ("NSC") issued regulations intended to guide NSC staff in response to requests for classified material under the amended Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the extent that Act is applicable to the National Security Council. *See* C.F.R. § 2101.1; 40 Fed. Reg. 7316 (February 19, 1975). Since that time, the NSC has responded to FOIA requests for those institutional records mentioned above, although the specific question of its legal obligation to do so has not ultimately resolved.

C. Armstrong v. EOP Litigation

In the pending *Armstrong v. EOP* litigation, NSC's record-keeping and FOIA practices of treating distinct categories of records have been challenged. On August 13, 1993, the Court of Appeals for the District of Columbia Circuit issued a decision which held in part that NSC's recordkeeping guidelines defining what are Presidential records are subject to judicial review. Armstrong v. EOP, 1 F.3d 1274, 1290 (D.C.Cir. 1993). The court of appeals ordered that the case be remanded to the district court for further proceedings "to

determine whether NSC's guidelines inappropriately classify as presidential records materials that would otherwise be subject to FOIA." *Id.* at 1296.

In reaching its decision, the court of appeals noted that the definition of a Presidential record in the PRA specifically excludes any documentary materials of an "agency" as that term is defined under FOIA. 44 U.S.C. 2201(2)(B)(i). *Armstrong v. EOP*, 1 F.3d. 1274, 1290. Accordingly, the court found that the Presidential Records Act would apply only to records that fall outside the scope of the FOIA because they are not agency records. *Id.* at 1292.

In analyzing whether the definition of a Presidential record intrudes upon the definition of an agency record subject to the FOIA, the court said that the inquiry is whether the entity at issue which maintains the records is an "agency" whose records is subject to the FOIA. *Armstrong v. EOP*, 1 F.3d at 1294. Relying on Supreme Court and D.C. Circuit case law, the court noted that "only entities 'whose sole function is to advise the President' are not separate agencies subject to FOIA." *Id.* at 1295.

D. NSC Status as a Presidential Entity

The NSC was created by Congress in the National Security Act of 1947, 50 U.S.C. 402. By statue, the National Security Council includes the President, the Vice President, and the Secretaries of State and Defense. *Id.* Other high-ranking officials may be designated by the President as Council members, or to attend Council meetings. The 1947 Act sets forth the NSC's statutory functions. Subsection (a) of the Act provides, in part that the "function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security." 50 U.S.C. § 402(a).

The 1947 Act also provides for the creation of a staff to support the NSC. The NSC staff advises and assists the President, under the direction of the Assistant to the President for National Security Affairs ("APNSA") and the Deputy Assistant to the President for National Security Affairs ("DAPNSA"). Taking into account the historical and current functions and purposes of the NSC, the NSC is an entity within the Executive Office of the President that exists solely to advise and assist the President in the discharge of his constitutionally based responsibilities over the national security affairs of the United States. As a matter of law, therefore, the NSC is not an "agency" as that term has been defined and construed under the Freedom of Information Act. Therefore, the NSC's disclosure policies and practices should reflect that the NSC shall maintain its records in accordance with the Presidential Records Act, and the NSC's existing FOIA guidelines should be revoked.

E. New Disclosure and Disposition Policy

On March 24, 1994, President Clinton sent a memorandum to me and Tony Lake directing us to provide for continued public access to those NSC records that have previously been left to an incoming administration to promote continuity in national security matters. Pursuant to this Presidential memorandum, the NSC shall establish a disclosure policy under which procedures will be developed to make these records available on a discretionary basis. These records, which previously would have been searched by NSC in response to FOIA requests, shall continue to be searched and, subject to the exemptions from disclosure set forth in the FOIA, made available to requesters on a discretionary basis—notwithstanding the NSC's status as a Presidential entity within the EOP.

In addition, the President's memorandum directed the NSC to provide for the release of appropriate NSC records of the current Administration. Therefore, the NSC will continue to respond to document requests regarding appropriate Clinton

administration records, subject to the exemptions from disclosure set forth in the FOIA. A statement of the NSC's new disclosure policy and procedures should be prepared for my signature and subsequent publication in the *Federal Register*.

Finally, the President's memorandum directed the NSC to transfer to the next Administration copies of appropriate NSC records in order to provide for a smooth transition and continuity of important foreign policy and national security matters. Accordingly, you should develop a plan to provide for identifying and transferring copies of such records.

A96

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

May 8, 1993

MEMORANDUM FOR NATIONAL SECURITY COUNCIL STAFF

FROM: WILLIAM H. ITOH, ALAN J. KRECZKO

SUBJECT: Recordkeeping Guidance

Pursuant to the Presidential Records Act, the Federal Records Act, and pending court orders, all staff within the Executive Office of the President are obligated to create, maintain, and preserve records of their activities. The attached memoranda reflect the general guidance being provided to all EOP staff. All NSC staff should review carefully and comply with the guidance in these memoranda.

Because the NSC both advises and assists the President and is an agency, the issue of which NSC records are presidential and which are federal is an important one. The Office of the Legal Adviser and the Information Management staff will be providing shortly additional training to assist all NSC staff in implementing the attached guidance.

Attachments

Tab A Memorandum on Federal Records

Tab B Memorandum on Presidential Records

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C. 20506

MEMORANDUM FOR ALL NATIONAL SECURITY COUNCIL STAFF

FROM: WILLIAM ITOH, ALAN KRECZKO

SUBJECT: Federal Records

INTRODUCTION

The offices within the Executive Office of the President generate two categories of records: "Presidential Records" and "Federal Records."

Records are "Presidential" if they are "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President." Such Presidential records are subject to the provisions of the Presidential Records Act, 44 U.S.C. § 2201. Presidential records remain in the custody and control of the President during his term of office and are not accessible to the public until five years after the end of the Administration, at the earliest. The treatment of Presidential records will be addressed in a separate memorandum.

It is the purpose of this memorandum to discuss the identification, maintenance and disposition of "federal" records. Materials are "federal records" if (1) the materials have been created or received by agency personnel in connection with their official duties in a federal agency, and (2) the materials are appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal

records are subject to the provisions of the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33. Unlike Presidential records, federal records are accessible to the public during the Administration's term, unless exempt from disclosure under the provisions of the Freedom of Information Act.[1]

The Federal Records Act imposes certain legal obligations with respect to the creation and receipt, custody and maintenance, and disposition of federal records. The responsibilities apply regardless of whether the records are generated in paper form or by automated systems.

It is critical that staff members in offices, such as the National Security Council, that create or receive both federal and Presidential records, file those records *separately* in clearly designated files. Documents subject to the Federal Records Act may be subject to public disclosure under the Freedom of Information Act. Presidential records, by contrast, are not

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[1] All records of the White House Office, the Office of Policy Development, the National Economic Council, the Council of Economic Advisers, the President's Intelligence Oversight Board and the President's Foreign Intelligence Advisory Board are Presidential records. The records of the Office of the Vice President are treated in the same manner as Presidential records under the Presidential Records Act. The records of the Office of the Vice President are not federal records. Records of the National Security Council staff are Presidential Records if they were received or created by or for the President, the Assistant to the President for National Security Affairs, the Deputy Assistant to the President for National Security Affairs, the White House office, or a unit or an individual within the NSC in advising or assisting the President, and are not official records of the NSC. Records produced or received by the Director of the Office of Science and Technology Policy in his role as Science Advisor to the President are Presidential records and should be segregated as such. Other records of the OSTP are federal records. Records of the Office of Management and Budget, the Office of the United States Trade Representative, the Council on Environmental Quality, and the Office of Administration are federal, not Presidential records.

subject to the Federal Records Act and are not subject to the provisions of the Freedom of Information Act during the President's term of office. Personal records (defined and discussed below) also should be segregated, and filed separately, from official records.

The guidance that follows will assist EOP staff in complying with the Federal Records Act, which is designed to ensure that documentation of official activities is adequately created and preserved. See 44 U.S.C. § 3101. As explained below, not every document that you create or receive will be subject to the Federal Records Act, and it is therefore important to review this guidance to understand when federal records act obligations do apply. In preparing this guidance, we have consulted with officials of the National Archives and Records Administration.

DEFINITION OF FEDERAL RECORDS

The Federal Records Act defines federal records as:

> [A]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States under Federal law or in connection with the transaction of public business and preserved or appropriate for preservations by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.
>
> —44 U.S.C. § 3301.

Under this definition, federal records are documentary materials that meet two personnel in connection with their official duties in a federal agency. *First*, the materials must have been *created* or *received* by agency personnel in connection with

their official duties in a federal agency. *Second*, the materials must be appropriate for preservation as evidence of the agency's activities or because they contain information of value. Federal records may be in any physical form, including paper, film and disk. The method used to record information may be manual, mechanical, photographic, electronic, or any combination of these or other technologies.

A document created in any agency normally becomes a federal record once it is circulated to others in the course of conducting agency business, or once it is placed in files accessible to others. Moreover, even documents that are not circulated can become federal records if, in the judgment of the agency, those documents are needed to conduct agency business—and whether or not those documents are accommodated by current filing systems employed by the agency.

Materials *received* by agency personnel are federal records when they are received in the course of official business. Materials received can become federal records whether they have been transmitted in person, by messenger, by mail, by electronic communication, or by any other means.

At the same time, certain types of documentary materials are *not* subject to the Federal Records Act. The Act specifically excludes (1) library or exhibit purposes; (2) extra copies of documents kept only for convenience of reference; and (3) stocks of publications and processed documents. These and other types of transitory or duplicate records are considered "nonrecord" because they are not "appropriate for preservation" as defined in the Act. Such materials are not needed to provide full and accurate documentation of an agency's policies, decisions, procedures, and program activities. These materials need not be maintained in official files, and, unlike federal records, may be destroyed when no longer needed and without prior approval of the National Archives and Records Administration.

Other examples of "nonrecord" materials not covered by the Federal Records Act may include:

— Preliminary drafts, that are not circulated to any other individual, of correspondence, reports, and studies.
— Preliminary drafts, work sheets and informal notes that contain information reflected in final documents and that do not document policy development or execution.
— Tickler, follow-up or suspense copies of correspondence, provided there are
— Newspaper clippings or news summaries, particularly if they are not annotated.
— Copies of printed or processed agency materials, such as operating and procedural manuals, directives, and notices, distributed for the information or use of agency employees.
— Shorthand and other notes that have been transcribed or converted to formal documents that have been verified for accuracy and completeness.
— Catalogs, trade journals, and other publications that are received from other government agencies, commercial firms, or private institutions and that are maintained for reference purposes.

In addition, certain "personal papers" fall outside the scope of the Federal Records Act. Personal papers are documentary materials that are not used in the transaction of agency business. Examples include:

— Papers and other materials accumulated by a staff member before joining government service.
— Materials that relate to a staff member's private affairs, such as personal financial records, insurance forms, and materials relating to an individual's professional activities and outside business and political pursuits.
— Personal photographs.
— Materials that may refer to official duties but are not directly used to carry out those duties. These include diaries, personal calendars, journals, and notes intended for

an individual's personal use (memory aids and personal observations on work-related matters)[2].

It is important to remember, however, that certain informal documents may be federal records. In the Executive Office of the President, to a greater extent than in many other government offices, drafts, notes, background materials or working papers can be considered federal records because they document policy development, significant decisions, major activities, or other matters basic to an understanding of the office and its role in government operations. Such records should be treated as federal records and maintained in official files if they were circulated for review or clearance, and if they have been modified substantively.

When it is difficult to determine whether documents or other records should be treated as federal records, you *should* tentatively treat them as federal records and contact the appropriate EOP agency records management office for a final determination. Legal questions will be referred by the records management office to appropriate counsel.

RECORDS CREATION AND MAINTENANCE REQUIREMENTS

When acting in their capacity as employees of a federal agency, such agency employees are responsible for complying with the Federal Records Act and related regulations. The law requires that adequate and proper records be created and preserved to document the organization, functions, policies, decisions, procedures and essential transactions of the agency.The law also specifically requires that records be kept for appropriate

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[2]For further information on personal papers, consult Personal Papers of Executive Branch Officials: A Management Guide, published by the National Archives and Records Administration. Copies are available in the EOP Office of Administration.

periods if they can be used to protect the legal and financial rights of the Government or individuals directly affected by the agency's activities.

In order to ensure that agency records contain an adequate and proper account of policy development, implementation and decision-making, each employee, must document those discussions, meetings and telephone conversations that are necessary to understand these functions. Where appropriate, in formal settings, minutes or notes should be taken for the purpose of including them in official files.

All staff members are responsible for complying with procedures that result in adequate and proper records creation and maintenance. All materials meeting federal records criteria must be incorporated into appropriate agency files or records systems. EOP staff members should consult with the appropriate EOP agency records management office to address any questions concerning the creation and maintenance of federal records.

ELECTRONIC FEDERAL RECORDS

Increasingly, federal records may be created electronically. Records may be generated on word processing, or electronic mail ("e-mail"), systems, or other computer applications.

Records generated electronically must be incorporated into an official recordkeeping system. Thus, no word processing or e-mail document that is a federal record should be deleted unless it has been (a) printed and placed in an appropriate file, or (b) preserved in an appropriate electronic system.

On January 6 and 11, 1993, in the case of *Armstrong v. Executive Office of the President*, United States District Judge Charles R. Richey directed the National Archives and Records Administration to work with components of the EOP to develop further recordkeeping guidance both for e-mail communications

in the EOP and for disposition of EOP electronic federal records generally. Pursuant to these orders, and until further instructions from the Counsel's office, the following special rules should be observed by components of the EOP that generate federal records:

1. Material may not be deleted from any e- mail file unless (a) the material has been retained in full on a back-up tape or other comparable medium, and (b) the retained version includes both full text and all available transmittal information; and

2. EOP staff members with records management responsibility must monitor the implementation of guidance on federal records (including the status of records) to ensure consistent application of the court's order.

Questions concerning the status of electronic records, or the application of these rules to particular computer systems, should be directed to the appropriate EOP agency records management office. That office will periodically monitor electronic records systems to ensure that correct records status determinations have been made.

DESTRUCTION OR REMOVAL OF FEDERAL RECORDS

Federal records, as defined by the Federal Records Act, may not be destroyed, or permanently removed from appropriate official files, without the prior approval of the National Archives and Records Administration. Federal records should be maintained in organized files and may not be damaged or altered by any staff member, except where required by statute or regulation. Nor may federal records be temporarily removed from official files except for official purposes, and only if returned to the official files upon completion of that official function.

Policies and procedures governing the disposition of federal records are prescribed by the National Archives and Records Administration and are incorporated into the EOP records management program. Further information concerning these policies and procedures should be obtained from the appropriate EOP records management office.

REMOVAL OF NONRECORD AND PERSONAL MATERIALS

Purely personal, unclassified materials may be removed from the office by staff members at any time, subject to any agency procedures regulating such removal. Unclassified nonrecord materials, with the exception of copies of records, may be removed with the prior approval of the agency official with records management responsibility.

Except where expressly authorized by appropriate agency officials, copies of federal records, regardless of the reason for which they have been duplicated, may not be taken by staff members for any purpose other than an official purpose related to the staff members' official duties and responsibilities. No classified materials may be removed from the office at any time, without compliance with the rules applicable to such materials.

TRAINING

EOP agency records management offices and other appropriate personnel will be providing records management training for all employees who generate or receive federal records.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 95-5057 **September Term, 1996**
89cv00142

Scott Armstrong, et al.,
Appellees

v.

William J. Clinton, et al.,
Appellants

Casper Weinberger,
Appellee

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
FILED

NOV 6, 1996

CLERK

Consolidated with 95-5061

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellees/cross-appellants' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/s
Robert A. Bonner
Deputy Clerk

Circuit Judges Wald and Tatel would grant the suggestion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 95-5057 **September Term, 1996**
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v.

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Appellants

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UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
FILED

NOV 6, 1996

CLERK

Consolidated with 95-5061

BEFORE: Edwards, Chief Judge, Ginsburg and Tatel, Circuit Judges

ORDER

Upon consideration of appellees/cross-appellants' petition for rehearing filed September 16, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/s
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel would grant the petition.

SELECTED STATUTES, EXECUTIVE ORDERS AND REGULATIONS RELATING TO THE NSC

The National Security Act of 1947

50 U.S.C. § 402 National Security Council

(a) Establishment; presiding officer; functions; composition. There is established a council to be known as the National Security Council (hereinafter in this section referred to as the "Council").

The President of the United States shall preside over meetings of the Council: Provided, That in his absence he may designate a member of the Council to preside in his place.

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

The Council shall be composed of -

(1) the President;

(2) the Vice President;

(3) the Secretary of State;

(4) the Secretary of Defense;

(5) the Director for Mutual Security;

(6) the Chairman of the National Security Resources Board; and

(7) the Secretaries and Under Secretaries of other executive departments and of the military departments, the Chairman of the Munitions Board, and the Chairman of the Research and Development Board, when appointed by the President by and with the advice and consent of the Senate, to serve at his pleasure.

(b) Additional functions

In addition to performing such other functions as the President may direct, for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security, it

shall, subject to the direction of the President, be the duty of the Council -

(1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and

(2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

(c) Executive secretary; appointment; staff employees

The Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President. The executive secretary, subject to the direction of the Council, is authorized, subject to the civil-service laws and chapter 51 and subchapter III of chapter 53 of title 5, to appoint and fix the compensation of such personnel as may be necessary to perform such duties as may be prescribed by the Council in connection with the performance of its functions.

(d) Recommendations and reports

The Council shall, from time to time, make such recommendations, and such other reports to the President as it deems appropriate or as the President may require.

(e) Participation of Chairman or Vice Chairman of Joint Chiefs of Staff

The Chairman (or in his absence the Vice Chairman) of the Joint Chiefs of Staff may, in his role as principal military adviser to the National Security Council and subject to the direction of the President, attend and participate in meetings of the National Security Council.

(f) Participation by Director of National Drug Control Policy

The Director of National Drug Control Policy may, in his role as principal adviser to the National Security Council on national drug control policy, and subject to the direction of the President, attend and participate in meetings of the National Security Council.

(g) Board for Low Intensity Conflict

The President shall establish within the National Security Council a board to be known as the "Board for Low Intensity Conflict". The principal function of the board shall be to coordinate the policies of the United States for low intensity conflict.

(h) Participation of Director of Central Intelligence

The Director of Central Intelligence (or, in the Director's absence, the Deputy Director of Central Intelligence) may, in the performance of the Director's duties under this Act and subject to the direction of the President, attend and participate in meetings of the National Security Council.

* * *

50 U.S.C. § 403-3

Responsibilities of Director of Central Intelligence

(a) Provision of intelligence

(1) Under the direction of the National Security Council, the Director of Central Intelligence shall be responsible for providing national intelligence -

(A) to the President;

(B) to the heads of departments and agencies of the executive branch;

(C) to the Chairman of the Joint Chiefs of Staff and senior military commanders; and

(D) where appropriate, to the Senate and House of Representatives and the committees thereof.

(2) Such national intelligence should be timely, objective, independent of political considerations, and based upon all sources available to the intelligence community.

* * *

(c) Head of intelligence community

In the Director's capacity as head of the intelligence community, the Director shall -

(1) develop and present to the President an annual budget for the National Foreign Intelligence Program of the United States;

(2) establish the requirements and priorities to govern the collection of national intelligence by elements of the intelligence community;

(3) promote and evaluate the utility of national intelligence to consumers within the Government;

(4) eliminate waste and unnecessary duplication within the intelligence community;

(5) protect intelligence sources and methods from unauthorized disclosure; and

(6) perform such other functions as the President or the National Security Council may direct.

(d) Head of Central Intelligence Agency

In the Director's capacity as head of the Central Intelligence Agency, the Director shall -

(1) collect intelligence through human sources and by other appropriate means, except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions;

(2) provide overall direction for the collection of national intelligence through human sources by elements of the intelligence community authorized to undertake such collection and, in coordination with other agencies of the Government which are authorized to undertake such collection, ensure that the most effective use is made of resources and that the risks to the United States and those involved in such collection are minimized;

(3) correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence;

(4) perform such additional services as are of common concern to the elements of the intelligence community, which services the Director of Central Intelligence determines can be more efficiently accomplished centrally; and

(5) perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.

Executive Orders

Executive Order No. 12,333
UNITED STATES INTELLIGENCE ACTIVITIES

Timely and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents, is essential to the national security of the United States. All reasonable and lawful means must be used to ensure that the United States will receive the best intelligence available. For that purpose, by virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended, and as President of the United States of America, in order to provide for the effective conduct of United States intelligence activities and the protection of constitutional rights, it is hereby ordered as follows:

PART 1 - GOALS, DIRECTION, DUTIES AND RESPONSIBILITIES WITH RESPECT TO THE NATIONAL INTELLIGENCE EFFORT

1.1 GOALS

The United States intelligence effort shall provide the President and the National Security Council with the necessary information on which to base decisions concerning the conduct and development of foreign, defense and economic policy, and the protection of United States national interests from foreign security threats. All departments and agencies shall cooperate fully to fulfill this goal.

(a) Maximum emphasis should be given to fostering analytical competition among appropriate elements of the Intelligence Community.

(b) All means, consistent with applicable United States law and this Order, and with full consideration of the rights of United States persons, shall be used to develop intelligence information for the President and the National Security Council. A balanced approach between technical collection efforts and other means should be maintained and encouraged.

(c) Special emphasis should be given to detecting and countering espionage and other threats and activities directed by foreign intelligence services against the United States Government, or United States corporations, establishments, or persons.

(d) To the greatest extent possible consistent with applicable United States law and this Order, and with full consideration of the rights of United States persons, all agencies and departments should seek to ensure full and free exchange of information in order to derive maximum benefit from the United States intelligence effort.

1.2 THE NATIONAL SECURITY COUNCIL

(a) Purpose. The National Security Council (NSC) was established by the National Security Act of 1947 to advise the President with respect to the integration of domestic, foreign and military policies relating to the national security. The NSC shall act as the highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs.

(b) Committees. The NSC shall establish such committees as may be necessary to carry out its functions and responsibilities under this Order. The NSC, or a committee established by it, shall consider and submit to the President a policy recommendation, including all dissents, on each special activity and shall review proposals for other sensitive intelligence operations.

* * *

1.5 DIRECTOR OF CENTRAL INTELLIGENCE

In order to discharge the duties and responsibilities prescribed by law, the Director of Central Intelligence shall be responsible directly to the President and the NSC and shall:

(a) Act as the primary adviser to the President and the NSC on national foreign intelligence and provide the President and other officials in the Executive Branch with national foreign intelligence;

* * *

(m) Establish mechanisms which translate national foreign intelligence objectives and priorities approved by the NSC into specific guidance for the Intelligence Community, resolve conflicts in tasking priority, provide to departments and agencies having information collection capabilities that are not part of the National Foreign Intelligence Program advisory tasking concerning collection of national foreign intelligence, and provide for the development of plans and arrangements for transfer of required collection tasking authority to the Secretary of Defense when directed by the President;

* * *

1.8 THE CENTRAL INTELLIGENCE AGENCY

All duties and responsibilities of the CIA shall be related to the intelligence functions set out below. As authorized by this Order; the National Security Act of 1947, as amended; the CIA Act of 1949, as amended; appropriate directives or other applicable law, the CIA shall:

* * *

(f) Conduct services of common concern for the Intelligence Community as directed by the NSC;

* * *

1.11 THE DEPARTMENT OF DEFENSE

The Secretary of Defense shall:

* * *

(e) Conduct, as the executive agent of the United States Government, signals intelligence and communications security activities, except as otherwise directed by the NSC;

* * *

3.2 IMPLEMENTATION

The NSC, the Secretary of Defense, the Attorney General, and the Director of Central Intelligence shall issue such appropriate directives and procedures as are necessary to implement this Order. Heads of agencies within the Intelligence Community shall issue appropriate supplementary directives and procedures consistent with this Order. The Attorney General shall provide a statement of reasons for not approving any procedures established by the head of an agency in the Intelligence Community other than the FBI. The National

Security Council may establish procedures in instances where the agency head and the Attorney General are unable to reach agreement on other than constitutional or other legal grounds.

Executive Order No. 12,472
ASSIGNMENT OF NATIONAL SECURITY AND EMERGENCY PREPAREDNESS TELECOMMUNICATIONS FUNCTIONS

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Communications Act of 1934, as amended (47 U.S.C. 151), the National Security Act of 1947, as amended, the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061), the Federal Civil Defense Act of 1950, as amended (50 U.S.C. App. 2251), the Disaster Relief Act of 1974 (42 U.S.C. 5121), Section 5 of Reorganization Plan No. 1 of 1977 (3 C.F.R. 197, 1978 Comp.) (5 U.S.C. App.), and Section 203 of Reorganization Plan No. 3 of 1978 (3 C.F.R. 389, 1978 Comp.) (5 U.S.C. App.), and in order to provide for the consolidation of assignment and responsibility for improved execution of national security and emergency preparedness telecommunications functions, it is hereby ordered as follows:

Section 1. The National Communications System.

(a) There is hereby established the National Communications System (NCS). The NCS shall consist of the telecommunications assets of the entities represented on the NCS Committee of Principals and an administrative structure consisting of the Executive Agent, the NCS Committee of Principals and the Manager. The NCS Committee of Principals shall consist of representatives from those Federal departments, agencies or entities, designated by the President, which lease or own telecommunications facilities or services of significance to national security or emergency preparedness, and, to the extent permitted by law, other Executive entities which bear policy, regulatory or enforcement responsibilities of importance to national security or emergency preparedness telecommunications capabilities.

(b) The mission of the NCS shall be to assist the President, the National Security Council, the Director of the Office of Science and Technology Policy and the Director of the Office of Management and Budget in:

(1) the exercise of the telecommunications functions and responsibilities set forth in Section 2 of this Order; and

(2) the coordination of the planning for and provision of national security and emergency preparedness communications for the Federal government under all circumstances, including crisis or emergency, attack, recovery and reconstitution.

* * *

(e) The Secretary of Defense is designated as the Executive Agent for the NCS. The Executive Agent shall:

* * *

(4) Recommend, in consultation with the NCS Committee of Principals, to the National Security Council, the Director of the Office of Science and Technology Policy, or the Director of the Office of Management and Budget, as appropriate:

a. The assignment of implementation or other responsibilities to NCS member entities;

b. New initiatives to assist in the exercise of the functions specified in Section 2; and

c. Changes in the composition or structure of the NCS;

* * *

(f) The NCS Committee of Principals shall:

* * *

(3) Provide comments or recommendations, as appropriate, to the National Security Council, the Director of the Office of Science and Technology Policy, the Director of the Office of Management and Budget, the Executive Agent, or the Manager of the NCS, regarding ongoing or prospective activities of the NCS; and

(4) Perform such other duties as are from time to time assigned by the President or his authorized designee.

* * *

Sec. 2. Executive Office Responsibilities.

(a) Wartime Emergency Functions. (1) The National Security Council shall provide policy direction for the exercise

of the war power functions of the President under Section 606 of the Communications Act of 1934, as amended (47 U.S.C. 606), should the President issue implementing instructions in accordance with the National Emergencies Act (50 U.S.C. 1601).

(2) The Director of the Office of Science and Technology Policy shall direct the exercise of the war power functions of the President under Section 606(a), (c)-(e), of the Communications Act of 1934, as amended (47 U.S.C. 606), should the President issue implementing instructions in accordance with the National Emergencies Act (50 U.S.C. 1601).

(b) Non-Wartime Emergency Functions.

(1) The National Security Council shall:

a. Advise and assist the President in coordinating the development of policy, plans, programs and standards within the Federal government for the identification, allocation, and use of the Nation's telecommunications resources by the Federal government, and by State and local governments, private industry and volunteer organizations upon request, to the extent practicable and otherwise consistent with law, during those crises or emergencies in which the exercise of the President's war power functions is not required or permitted by law; and

b. Provide policy direction for the exercise of the President's non-wartime emergency telecommunications functions, should the President so instruct.

* * *

(c) Planning and Oversight Responsibilities.

(1) The National Security Council shall advise and assist the President in:

a. Coordinating the development of policy, plans, programs and standards for the mobilization and use of the Nation's commercial, government, and privately owned telecommunications resources, in order to meet national security or emergency preparedness requirements;

b. Providing policy oversight and direction of the activities of the NCS; and

c. Providing policy oversight and guidance for the execution of the responsibilities assigned to the Federal departments and agencies by this Order.

(2) The Director of the Office of Science and Technology Policy shall make recommendations to the President with respect to the test, exercise and evaluation of the capability of existing and planned communications systems, networks or facilities to meet national security or emergency preparedness requirements and report the results of any such tests or evaluations and any recommended remedial actions to the President and to the National Security Council;

* * *

(4) The National Security Council, the Director of the Office of Science and Technology Policy and the Director of the Office of Management and Budget shall, in consultation with the Executive Agent for the NCS and the NCS Committee of Principals, determine what constitutes national security and emergency preparedness telecommunications requirements.

(d) Consultation with Federal Departments and Agencies. In performing the functions assigned under this Order, the National Security Council and the Director of the Office of Science and Technology Policy, in consultation with each other, shall:

(1) Consult, as appropriate, with the Director of the Office of Management and Budget; the Director of the Federal Emergency Management Agency with respect to the emergency management responsibilities assigned pursuant to Executive Order No. 12148, as amended; the Secretary of Commerce, with respect to responsibilities assigned pursuant to Executive Order No. 12046; the Secretary of Defense, with respect to communications security responsibilities assigned pursuant to Executive Order No. 12333; and the Chairman of the Federal Communications Commission or his authorized designee; and

(2) Establish arrangements for consultation among all interested Federal departments, agencies or entities to ensure that the national security and emergency preparedness communications needs of all Federal government entities are identified; that mechanisms to address such needs are

incorporated into pertinent plans and procedures; and that such needs are met in a manner consistent, to the maximum extent practicable, with other national telecommunications policies.

* * *

Executive Order No. 12,656
ASSIGNMENT OF EMERGENCY PREPAREDNESS RESPONSIBILITIES

WHEREAS our national security is dependent upon our ability to assure continuity of government, at every level, in any national security emergency situation that might confront the Nation; and

WHEREAS effective national preparedness planning to meet such an emergency, including a massive nuclear attack, is essential to our national survival; and

WHEREAS effective national preparedness planning requires the identification of functions that would have to be performed during such an emergency, the assignment of responsibility for developing plans for performing these functions, and the assignment of responsibility for developing the capability to implement those plans; and

WHEREAS the Congress has directed the development of such national security emergency preparedness plans and has provided funds for the accomplishment thereof;

NOW, THEREFORE, by virtue of the authority vested in me as President by the Constitution and laws of the United States of America, and pursuant to Reorganization Plan No. 1 of 1958 (72 Stat. 1799), the National Security Act of 1947, as amended (50 U.S.C. 401 et seq.), the Defense Production Act of 1950, as amended (see section 2061 of this Appendix), and the Federal Civil Defense Act, as amended, it is hereby ordered that the responsibilities of the Federal departments and agencies in national security emergencies shall be as follows:

PART 1 - PREAMBLE

Section 101. National Security Emergency Preparedness Policy.

(a) The policy of the United States is to have sufficient capabilities at all levels of government to meet essential defense

and civilian needs during any national security emergency. A national security emergency is any occurrence, including natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States. Policy for national security emergency preparedness shall be established by the President. Pursuant to the President's direction, the National Security Council shall be responsible for developing and administering such policy. All national security emergency preparedness activities shall be consistent with the Constitution and laws of the United States and with preservation of the constitutional government of the United States.

(b) Effective national security emergency preparedness planning requires: identification of functions that would have to be performed during such an emergency; development of plans for performing these functions; and development of the capability to execute those plans.

Sec. 102. Purpose.

(a) The purpose of this Order is to assign national security emergency preparedness responsibilities to Federal departments and agencies. These assignments are based, whenever possible, on extensions of the regular missions of the departments and agencies.

(b) This Order does not constitute authority to implement the plans prepared pursuant to this Order. Plans so developed may be executed only in the event that authority for such execution is authorized by law.

Sec. 103. Scope.

(a) This Order addresses national security emergency preparedness functions and activities. As used in this Order, preparedness functions and activities include, as appropriate, policies, plans, procedures, and readiness measures that enhance the ability of the United States Government to mobilize for, respond to, and recover from a national security emergency.

(b) This Order does not apply to those natural disasters, technological emergencies, or other emergencies, the alleviation of which is normally the responsibility of individuals, the private sector, volunteer organizations, State and local

governments, and Federal departments and agencies unless such situations also constitute a national security emergency.

(c) This Order does not require the provision of information concerning, or evaluation of, military policies, plans, programs, or states of military readiness.

(d) This Order does not apply to national security emergency preparedness telecommunications functions and responsibilities that are otherwise assigned by Executive Order 12,472.

Sec. 104. Management of National Security Emergency Preparedness.

(a) The National Security Council is the principal forum for consideration of national security emergency preparedness policy.

(b) The National Security Council shall arrange for Executive branch liaison with, and assistance to, the Congress and the Federal judiciary on national security-emergency preparedness matters.

(c) The Director of the Federal Emergency Management Agency shall serve as an advisor to the National Security Council on issues of national security emergency preparedness, including mobilization preparedness, civil defense, continuity of government, technological disasters, and other issues, as appropriate. Pursuant to such procedures for the organization and management of the National Security Council process as the President may establish, the Director of the Federal Emergency Management Agency also shall assist in the implementation of and management of the National Security Council process as the President may establish, the Director of the Federal Emergency Management Agency also shall assist in the implementation of national security emergency preparedness policy by coordinating with the other Federal departments and agencies and with State and local governments, and by providing periodic reports to the National Security Council on implementation of national security emergency preparedness policy.

(d) National security emergency preparedness functions that are shared by more than one agency shall be coordinated by the

head of the Federal department or agency having primary responsibility and shall be supported by the heads of other departments and agencies having related responsibilities.

(e) There shall be a national security emergency exercise program that shall be supported by the heads of all appropriate Federal departments and agencies.

(f) Plans and procedures will be designed and developed to provide maximum flexibility to the President for his implementation of emergency actions.

* * *

PART 2 - GENERAL PROVISIONS

Sec. 201. General. The head of each Federal department and agency, as appropriate, shall:

* * *

(7) Make policy recommendations to the National Security Council regarding national security emergency preparedness activities and functions of the Federal Government;

* * *

(15) Consult and coordinate with the Director of the Federal Emergency Management Agency to ensure that those activities and plans are consistent with current National Security Council guidelines and policies.

* * *

Sec. 206. Research. The Director of the Office of Science and Technology Policy and the heads of Federal departments and agencies having significant research and development programs shall advise the National Security Council of scientific and technological developments that should be considered in national security emergency preparedness planning.

* * *

Sec. 208. Transfer of Functions. Recommendations for interagency transfer of any emergency preparedness function assigned under this Order or for assignment of any new emergency preparedness function shall be coordinated with all affected Federal departments and agencies before submission to the National Security Council.

* * *

Executive Order No. 12,829
NATIONAL INDUSTRIAL SECURITY PROGRAM

This order establishes a National Industrial Security Program to safeguard Federal Government classified information that is released to contractors, licensees, and grantees of the United States Government. To promote our national interests, the United States Government issues contracts, licenses, and grants to nongovernment organizations. When these arrangements require access to classified information, the national security requires that this information be safeguarded in a manner equivalent to its protection within the executive branch of Government. The national security also requires that our industrial security program promote the economic and technological interests of the United States. Redundant, overlapping, or unnecessary requirements impede those interests. Therefore, the National Industrial Security Program shall serve as a single, integrated, cohesive industrial security program to protect classified information and to preserve our Nation's economic and technological interests.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, including the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011-2286) (42 U.S.C. 2011 et seq.), the National Security Act of 1947, as amended, and the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2) (5 App. U.S.C.), it is hereby ordered as follows:

PART 1. ESTABLISHMENT AND POLICY

Section 101. Establishment. (a) There is established a National Industrial Security Program. The purpose of this program is to safeguard classified information that may be released or has been released to current, prospective, or former contractors, licensees, or grantees of United States agencies. For the purposes of this order, the terms "contractor, licensee, or grantee" means current, prospective, or former contractors, licensees, or grantees of United States agencies. The National Industrial Security Program shall be applicable to all executive branch departments and agencies.

(b) The National Industrial Security Program shall provide for the protection of information classified pursuant to Executive Order No. 12356 of April 2, 1982, or its successor, and the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

(c) For the purposes of this order, the term "contractor" does not include individuals engaged under personal services contracts.

Sec. 102. Policy Direction. (a) The National Security Council shall provide overall policy direction for the National Industrial Security Program.

(b) The Director of the Information Security Oversight Office, established under Executive Order No. 12356 of April 2, 1982, shall be responsible for implementing and monitoring the National Industrial Security Program and shall:

(1) develop, in consultation with the agencies, and promulgate subject to the approval of the National Security Council, directives for the implementation of this order, which shall be binding on the agencies;

(2) oversee agency, contractor, licensee, and grantee actions to ensure compliance with this order and implementing directives;

(3) review all agency implementing regulations, internal rules, or guidelines. The Director shall require any regulation, rule, or guideline to be changed if it is not consistent with this order or implementing directives. Any such decision by the Director may be appealed to the National Security Council. The agency regulation, rule, or guideline shall remain in effect pending a prompt decision on the appeal;

(4) have the authority, pursuant to terms of applicable contracts, licenses, grants, or regulations, to conduct on-site reviews of the implementation of the National Industrial Security Program by each agency, contractor, licensee, and grantee that has access to or stores classified information and to require of each agency, contractor, licensee, and grantee those reports, information, and other cooperation that may be necessary to fulfill the Director's responsibilities. If these reports, inspections, or access to specific classified information,

or other forms of cooperation, would pose an exceptional national security risk, the affected agency head or the senior official designated under section 203(a) of this order may request the National Security Council to deny access to the Director. The Director shall not have access pending a prompt decision by the National Security Council;

* * *

(7) consider, in consultation with the advisory committee established by this order, affected agencies, contractors, licensees, and grantees, and recommend to the President through the National Security Council changes to this order; and

(8) report at least annually to the President through the National Security Council on the implementation of the National Industrial Security Program.

(c) Nothing in this order shall be construed to supersede the authority of the Secretary of Energy or the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), or the authority of the Director of Central Intelligence under the National Security Act of 1947, as amended, or Executive Order No. 12333 of December 8, 1981.

* * *

Executive Order No. 12,919
NATIONAL DEFENSE INDUSTRIAL RESOURCES PREPAREDNESS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Defense Production Act of 1950, as amended (64 Stat. 798; 50 U.S.C. App. 2061, et seq.), and section 301 of title 3, United States Code, and as Commander in Chief of the Armed Forces of the United States, it is hereby ordered as follows:

PART I - PURPOSE, POLICY AND IMPLEMENTATION

Section 101. Purpose. This order delegates authorities and addresses national defense industrial resource policies and programs under the Defense Production Act of 1950, as

amended ("the Act"), except for the amendments to Title III of the Act in the Energy Security Act of 1980 and telecommunication authorities under Executive Order No. 12,472.

Sec. 102. Policy. The United States must have an industrial and technology base capable of meeting national defense requirements, and capable of contributing to the technological superiority of its defense equipment in peacetime and in times of national emergency. The domestic industrial and technological base is the foundation for national defense preparedness. The authorities provided in the Act shall be used to strengthenthis base and to ensure it is capable of responding to all threats to the national security of the United States.

Sec. 103. General Functions. Federal departments and agencies responsible for defense acquisition (or for industrial resources needed to support defense acquisition) shall:

(a) Identify requirements for the full spectrum of national security emergencies, including military, industrial, and essential civilian demand;

(b) Assess continually the capability of the domestic industrial and technological base to satisfy requirements in peacetime and times of national emergency, specifically evaluating the availability of adequate industrial resource and production sources, including subcontractors and suppliers, materials, skilled labor, and professional and technical personnel;

(c) Be prepared, in the event of a potential threat to the security of the United States, to take actions necessary to ensure the availability of adequate industrial resources and production capability, including services and critical technology for national defense requirements;

(d) Improve the efficiency and responsiveness, to defense requirements, of the domestic industrial base; and

(e) Foster cooperation between the defense and commercial sectors for research and development and for acquisition of materials, components, and equipment to enhance industrial base efficiency and responsiveness.

Sec. 104. Implementation.

(a) The National Security Council is the principal forum for consideration and resolution of national security resource preparedness policy.

(b) The Director, Federal Emergency Management Agency ("Director, FEMA") shall:

(1) Serve as an advisor to the National Security Council on issues of national security resource preparedness and on the use of the authorities and functions delegated by this order;

(2) Provide for the central coordination of the plans and programs incident to authorities and functions delegated under this order, and provide guidance and procedures approved by the Assistant to the President for National Security Affairs tothe Federal departments and agencies under this order;

* * *

(c) The head of every Federal department and agency assigned functions under this order shall ensure that the performance of these functions is consistent with National Security Council policy and guidelines.

* * *

Regulations

32 C.F.R. § 2003.20
Classified Information Nondisclosure Agreement: SF 312; Classified Information Nondisclosure Agreement: SF 189; Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government): SF 189-A.

(a) SF 312, SF 189, and SF 189-A are nondisclosure agreements between the United States and an individual. The prior execution of at least one of these agreements, as appropriate, by an individual is necessary before the United States Government may grant that individual access to classified information. From the effective date of this rule, September 29, 1988, the SF 312 shall be used in lieu of both the SF 189 and the SF 189-A for this purpose. In any instance in which the language in the SF 312 differs from the language in either the SF 189 or SF 189-A, agency heads shall interpret

and enforce the SF 189 or SF 189-A in a manner that is fully consistent with the interpretation and enforcement of the SF 312.

(b) All employees of executive branch departments, and independent agencies or offices, who have not previously signed the SF 189, must sign the SF 312 before being granted access to classified information. An employee who has previously signed the SF 189 is permitted, at his or her own choosing, to substitute a signed SF 312 for the SF 189. In these instances, agencies shall take all reasonable steps to dispose of the superseded nondisclosure agreement or to indicate on it that it has been superseded.

(c) All Government contractor, licensee, and grantee employees, or other non-Government personnel requiring access to classified information in the performance of their duties, who have not previously signed either the SF 189 or the SF 189-A, must sign the SF 312 before being granted access to classified information. An employee who has previously signed either the SF 189 or the SF 189-A is permitted, at his or her own choosing, to substitute a signed SF 312 for either the SF 189 or the SF 189-A. In these instances, agencies, with the cooperation of the pertinent contractor, licensee or grantee, shall take all reasonable steps to dispose of the superseded nondisclosure agreement or to indicate on it that it has been superseded.

* * *

(k) Only the National Security Council may grant an agency's request for a waiver from the use of the SF 312. To apply for a waiver, an agency must submit its proposed alternative nondisclosure agreement to the Director of ISOO, along with a justification for its use. The Director of ISOO will request a determination about the alternative agreement's enforceability from the Department of Justice prior to making a recommendation to the National Security Council. An agency that has previously received a waiver from the use of the SF 189 or the SF 189-A need not seek a waiver from the use of the SF 312.

* * *

32 C.F.R. § 2101.41 PRIMARY REVIEW BY NSC STAFF

(a) The NSC Staff will have primary and authoritative review responsibility for Freedom of Information Act requests for the following types of classified material.

(1) Material originally classified by a properly authorized member of the NSC Staff and maintained under its control;

(2) Material produced for and processed by the NSC Staff even if not originally classified by an authorized member of the Staff;

(3) Material classified by a President, his White House Staff, the NSC Staff on his behalf, or special committee or commission appointed by him and which the Archivist of the United States has in his custody at any archival depository, including a Presidential Library, and which is concerned with "national defense or foreign policy" matters of "primary subject-matter interest" to the NSC Staff;

(4) Verbatim or extensively paraphrased NSC material appearing in documents originally classified by another agency.

(b) Requests received by other agencies for the material described above should be forwarded to the NSC Staff for action.

47 C.F.R. § 201.4 Responsibilities.

Executive responsibilities with respect to emergency preparedness and readiness in telecommunications matters are established and assigned as follows:

(a) The National Security Council (NSC).

(1) Coordinating the development of policy, plans, programs, and standards for the mobilization and use of the Nation's telecommunications resources in any emergency.

(2) Preparation of Presidential policy options concerning the development of the National Communications System (NCS).

* * *

47 C.F.R. § 211.5 Priorities.

There are hereby established four levels of restoration priority. Within each level, subpriorities may be established by the Executive Agent, with the concurrence of the National Security Council, for both government and nongovernment services. The subpriorities categories currently in use, which have been established by the Executive Agent will remain in effect until modified. Compatibility of subcategories applicable to government and nongovernment users is essential to achieve the objective of a single restoration priority system.

* * *

47 C.F.R. § 211.6 Submission and processing of restoration priority requests.

(a) Except as otherwise provided below, all requests for restoration priority assignments will be submitted to the Executive Agent in the format prescribed by him for processing and certification.

* * *

(c) Industrial/Commercial entities designated for prearranged voluntary participation with the Federal Government in a national emergency should submit separate applications to the Commission when requesting the assignment of priorities in category 1 or 2. Such assignments will require the approval of the National Security Council in order to continue to be effective during a war emergency. In all cases the justification for restoration priorities will contain a validation statement from the Government agency with whom participation is prearranged.

* * *

(g) All assignments, denials and changes of restoration priorities and subpriorities are subject to review and modification by the National Security Council.

47 C.F.R. § 213.0 Authority.

(a) The voice and message precedence procedures for departments and agencies of the Federal Government prescribed by this part are prescribed pursuant to Executive Order No. 12046 (43 FR 13349 et seq.) and the President's memorandum of August 21, 1963, which established the National Communications System (28 FR 9413; 3 C.F.R., 1959-1963 Comp., p. 858).

(b) The procedures applicable to communications common carriers and non-Federal Government users prescribed by this part are prescribed by authority conferred upon the President by subsection 606(a) of the Communications Act of 1934, as amended, and delegated to the National Security Council by Executive Order 12046. That authority under section 606(a) may be exercised only during the continuance of a war in which the United States is engaged.

47 C.F.R. § 213.1 Background and purpose.

(a) The National Security Council and the Federal Communications Commission have agreed upon a precedence system for the expeditious handling of messages and calls transmitted over Government and public correspondence facilities in all types of situations from peacetime to massive nuclear attack. Effectuation of that system requires that the Director issue a circular and that the Commission concurrently issue an order prescribing the standards, procedures, policies, and regulations that together, constitute this single integrated precedence system.

(b) In conformity with that agreement the National Security Council is issuing this circular the purpose of which is to prescribe, on behalf of the President, that part of those standards, procedures, policies, and regulations which are within the cognizance of the NSC. No significance should be attached to the fact that slightly different terms are used in their circular from those used in the companion order of the FCC. Those differences result from differences in terms in the basic

legal authorities of the director and the Commission rather than from an intent to denote a distinction in purpose or effect.

47 C.F.R. § 213.7 Policies.

* * *

(f) Any apparent misuse by Federal Government activities brought to the attention of the communication common carriers shall be referred to the Executive Agent, National Communications System. The Executive Agent will refer any matter which cannot be resolved with the cognizant Government activity to the National Security Council, for decision.

(g) It is essential to provide public message and call capability for the transmission of military, governmental, and essential non-Government precedence messages and calls. Private line services for military, governmental, and other essential users are protected under a Priority System for Intercity Private Line Services promulgated by the FCC (FCC Order 67-51) and the National Security Council. However, during national emergencies, military, governmental, and other essential users will have additional requirements for prompt completion of precedence traffic over public correspondence communication common carrier facilities. Therefore, notwithstanding the provisions of the above-described Priority System for Intercity Private Line Services, communication common carriers shall have available a minimum number of public correspondence circuits at all times so as to provide for the transmission of precedence type messages and calls. Normally, the communication common carriers shall use their judgment in determining this number of circuits required for public correspondence precedence traffic. However, the authority is reserved to the National Security Council or the Federal Communications Commission, as appropriate to the time and situation, to revise the decisions of the carriers respecting the allocation of circuits, and to resolve any questions which are referred to them by the carriers or the users.

Supreme Court, U.S.
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No. 96-1242

In the Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, ET AL., PETITIONERS

v.

EXECUTIVE OFFICE OF THE PRESIDENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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35 pp

QUESTION PRESENTED

Whether the National Security Council is an "agency" within the meaning of the Freedom of Information Act and the Federal Records Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A51) is reported at 90 F.3d 553. The opinion and order of the district court (Pet. App. A52-A88) are reported at 877 F. Supp. 690. Earlier opinions of the court of appeals in this case are reported at 1 F.3d 1274 and 924 F.2d 282. Earlier opinions of the district court are reported at 810 F. Supp. 335 and 721 F. Supp. 343.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on November 6, 1996. Pet. App. A106-A107. The petition for a writ of certiorari was filed on February 4, 1997. The jurisdiction of this Court is invoked under

28 U.S.C. 1257, but the proper basis is 28 U.S.C. 1254(1).

STATEMENT

1. *The Records Statutes.* a. Official government records are subject to one of two records schemes: the Federal Records Act (FRA), 44 U.S.C. Chs. 21, 29, 31, and 33; or the Presidential Records Act of 1978 (PRA), 44 U.S.C. 2201 *et seq.* Records of "Federal agencies"—often referred to as "federal records"—are governed by the FRA. The term "Federal agency" includes "executive agenc[ies]," which in turn include "any executive department or independent establishment in the executive branch of the Government." 40 U.S.C. 472(a); see 44 U.S.C. 2901(13) and (14). Records of federal "agencies" are also subject to the disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552.

"Presidential records" are governed by the PRA. The PRA defines "Presidential records" to include

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.

44 U.S.C. 2201(2). The term "Presidential records" does not include "official records of an agency." 44 U.S.C. 2201(2)(B). This Court has made clear that the term "agency," as it appears in the relevant statutes, does not include "the President's immediate personal

staff or units in the Executive Office [of the President (EOP)] whose sole function is to advise and assist the President." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974)).[1]

Thus, "[t]he FRA defines a class of materials that are federal records subject to its provisions, and the PRA describes another, mutually exclusive set of materials." *Armstrong* v. *Executive Office of the*

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[1] The PRA incorporates the FOIA's definition of "agency" contained in 5 U.S.C. 552(f). See 44 U.S.C. 2201(2)(B). In *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), the court of appeals construed the Administrative Procedure Act (APA) definition of "agency" (see 5 U.S.C. 551(1)) to include "any administrative unit with substantial independent authority in the exercise of specific functions." The court indicated, however, that, "[i]f [an entity's] sole function were to advise and assist the President, that might be taken as an indication that the [entity] is part of the President's staff and not a separate agency." 448 F.2d at 1075.

In 1974, Congress amended the FOIA definition so that it expressly covered any "establishment" in "the Executive Office of the President." Act of Nov. 21, 1974, Pub. L. No. 93-502, § 3, 88 Stat. 1564 (codified at 5 U.S.C. 552(f)). The Conference Report accompanying the 1974 amendments endorsed the *Soucie* analysis and stated that "[t]he term [Executive Office of the President] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974). This Court in *Kissinger* adopted that approach. 445 U.S. at 156. The *Soucie* standard has been incorporated into the PRA, which defines "Presidential records" to include materials "created or received by * * * a unit or individual of the Executive Office of the President whose function is to advise and assist the President." 44 U.S.C. 2201(2).

President, 1 F.3d 1274, 1293 (D.C. Cir. 1993) (*Armstrong II*). The determination of which statutory scheme applies to a given EOP component turns on whether that entity is an "agency" within the meaning of the relevant statutes. The answer to that question depends, in turn, on whether the entity performs functions other than advising and assisting the President.

b. The FRA provides for the creation, preservation, and disposition of federal records under guidance provided by the Archivist of the United States. 44 U.S.C. 2904. The FRA places "particular emphasis on the prevention of unnecessary Federal paperwork." 44 U.S.C. 2902(6). The Act is intended to "[c]ontrol * * * the quantity and quality of records produced by the Federal Government," in order "to prevent the creation of unnecessary records" and to "[s]implif[y] * * * [the] processes of records creation." 44 U.S.C. 2902(2), (3) and (4); see S. Rep. No. 1326, 94th Cong., 2d Sess. 2 (1976). The FRA also strives for accurate and complete documentation of the policies and transactions of the government, and the "[j]udicious preservation and disposal of records." 44 U.S.C. 2902(5).

"To achieve those ends, the FRA burdens the heads of federal agencies with several obligations." *Armstrong II*, 1 F.3d at 1278. The agency head is required to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." 44 U.S.C. 3101. He must "establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," and the program must satisfy specified requirements. 44 U.S.C. 3102. The

agency head must obtain the approval of the Archivist before disposing of records. 44 U.S.C. 3303, 3303a; see 44 U.S.C. 3314 ("records of the United States Government may not be alienated or destroyed except under this chapter"). The Archivist is required, in turn, to "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposal," 44 U.S.C. 2904(a); to "promulgate standards, procedures, and guidelines with respect to records management," 44 U.S.C. 2904(c)(1); and to perform other duties with respect to the implementation and enforcement of the FRA. See *Armstrong II*, 1 F.3d at 1279.

c. The PRA, effective in 1981, ended the tradition of private ownership of official presidential papers. The PRA requires the President to determine what materials qualify as "Presidential records" and to implement records management controls to assure the adequate documentation of the performance of his duties. 44 U.S.C. 2203(a); see also H.R. Rep. No. 1487, 95th Cong., 2d Sess., Pt. I, at 4 (1978). To avoid excessive retention of documents, the President may dispose of presidential records in his possession that no longer have "administrative, historical, informational, or evidentiary value," after obtaining the Archivist's views concerning the proposed disposal. 44 U.S.C. 2203(c) and (d). If the Archivist believes that the proposed destruction raises issues of interest to Congress or the public, the President must notify the appropriate committees of Congress of the intended destruction and provide copies of the disposition schedule. *Ibid.*

At the end of the President's service in office, the Archivist assumes custody and control of his presidential records and subsequently determines disposition of and public access to the records pursuant to the PRA, in conjunction with the FOIA. 44 U.S.C. 2203(f), 2204. Access to presidential records is generally delayed until the Archivist has processed them or five years after the end of the President's service in office, whichever is earlier. 44 U.S.C. 2203(f)(1), 2204(b)(2). The PRA permits the President to restrict access to certain categories of records for up to 12 years. 44 U.S.C. 2204(a). The Archivist's determination whether materials fall within those restrictions is subject to judicial review only upon an action initiated by the former President, if he believes that the determination violates any of his rights or privileges. 44 U.S.C. 2204(b)(3).

As the D.C. Circuit explained in a prior appeal in this case:

> The statutory scheme and legislative history of the PRA reflect a congressional intent to balance two competing goals. First, Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records for public access after the termination of a President's term in office. But Congress was also keenly aware of the separation of powers concerns that were implicated by legislation regulating the conduct of the President's daily operations. Congress therefore sought assiduously to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over

presidential records during the President's term in office.

Congress balanced these competing goals by requiring the President to maintain records documenting the policies, activities, and decisions of his administration, but leaving the implementation of such a requirement in the President's hands. For example, although the FRA authorizes the Archivist to promulgate guidelines and regulations to assist the agencies in the development of a records management system, the PRA lacks an analogous provision. The Archivist also lacks the authority under the PRA to inspect the President's records or survey the President's records management practices. Finally, the PRA does not require the Archivist to provide Congress with the annual reports on the President's record-keeping policies and practices that he must submit for agencies.

Moreover, the PRA accords the President virtually complete control over his records during his term of office. Although the President must notify the Archivist before disposing of records and the Archivist may inform Congress of the President's desire to dispose of the records, neither the Archivist nor the Congress has the authority to veto the President's disposal decision.

Armstrong v. *Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991) (*Armstrong I*) (citations omitted).

2. *The National Security Council.* The National Security Council (NSC or Council) was created by the National Security Act of 1947, ch. 343, § 101, 61 Stat. 496 (codified at 50 U.S.C. 402). By statute, the Council includes the President, the Vice-President,

and the Secretaries of State and Defense. See 50 U.S.C. 402(a)(1)-(4); Pet. App. A93. "Other high-ranking officials may be designated by the President as Council members, or to attend Council meetings." Pet. App. A93; see 50 U.S.C. 402(a)(7). The Act provides that "[t]he President of the United States shall preside over meetings of the Council." 50 U.S.C. 402(a). In addition, "[t]he Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President," without the advice and consent of the Senate. 50 U.S.C. 402(c).

The Council's function is

> to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving national security.

50 U.S.C. 402(a). "[S]ubject to the direction of the President," the Council is also required

> (1) to assess and appraise the objectives, commitments, and risks of the United States in relation to our actual and potential military power, in the interest of national security, for the purpose of making recommendations to the President in connection therewith; and
>
> (2) to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security, and to make recommendations to the President in connection therewith.

50 U.S.C. 402(b). The Council is also authorized to perform "such other functions as the President may direct." *Ibid.*

The NSC historically has treated most of its records as presidential records. IV C.A. App. 985. Most of those records have been transferred to the Presidential Library of the outgoing President upon the completion of his term in office, either as donated historical materials of the President or pursuant to the PRA since it became effective in 1981. See *ibid.*; V C.A. App. 1296 (¶ 4), 1312. Each Administration also has left behind some records for the purpose of promoting continuity in national security policy. See IV C.A. App. 985. Those records, previously described as NSC "institutional" files (*ibid.*; see V C.A. App. 1381 (No. 94)), were disposed of in accordance with the FRA. IV C.A. App. 985; V C.A. App. 1296 (¶ 4). Since 1975, the Council's practice has been to search those institutional files in response to FOIA requests. IV C.A. App. 985.

3. *Prior Proceedings.* a. On January 19, 1989—the last day of the second Reagan Administration—petitioners filed a FOIA request for EOP and NSC records generated on the electronic mail system since its installation in 1985. See *Armstrong I*, 924 F.2d at 286. Petitioners also filed suit in federal district court, seeking a declaration that many of the electronic documents were federal or presidential records, and an injunction against their unlawful destruction. See *id.* at 286-287. The government agreed to maintain all Reagan-era information on backup tapes pending the disposition of the suit. *Id.* at 287.

The district court denied the government's motion to dismiss and for summary judgment. *Armstrong* v. *Bush*, 721 F. Supp. 343 (D.D.C. 1989). The court

agreed with the government that neither the FRA nor the PRA provided a private right of action. *Id.* at 348-349. The court held, however, that the implementation of the two statutes by the President and subordinate executive branch officials was subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* 721 F. Supp. at 349-350. The court subsequently certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). See *Armstrong I*, 924 F.2d at 284.

b. The court of appeals affirmed in part, reversed in part, and remanded. *Armstrong I.* The court first held that the President's implementation of the PRA was not reviewable, both because the President is not an "agency" within the meaning of the APA,[2] and because the PRA impliedly precludes judicial review. 924 F.2d at 288-291. The court held, however, that petitioners' claims under the FRA were judicially cognizable under the APA. *Id.* at 291-294, 297. In the view of the court of appeals, "neither the statutory scheme nor the legislative history evinces a congressional intent to preclude judicial review of the adequacy of the NSC's recordkeeping guidelines and directives." *Id.* at 292. Because the court of appeals viewed the then-existing record as "inadequate to determine the reasonableness of the guidelines," the court remanded for further proceedings. *Id.* at 296.

c. On remand, the district court held that the EOP recordkeeping guidance, which directed EOP personnel to print out electronic mail messages that

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[2] Subsequent to the court of appeals' decision in *Armstrong I*, this Court agreed that the President is not an "agency" within the meaning of the APA. *Franklin* v. *Massachusetts*, 505 U.S. 788, 796 (1992).

were appropriate for preservation, was arbitrary and capricious because the printed copies did not capture all of the information associated with the messages that the district court deemed pertinent. *Armstrong* v. *Executive Office of the President*, 810 F. Supp. 335, 341-342 (D.D.C. 1993). However, the court rejected petitioners' contention that "the NSC's record keeping guidance is contrary to law because it instructs the staff to save certain material as presidential records when, in fact, they are federal records." *Id.* at 347. The court construed the language of the PRA, and the court of appeals' opinion in *Armstrong I*, as "demonstrat[ing] that the NSC is entitled to segregate presidential and federal records." *Ibid.* The district court declined to review the NSC's recordkeeping guidance with respect to presidential records, construing the decision in *Armstrong I* to hold that, insofar as the NSC created and maintained presidential records, review was precluded. *Id.* at 347-348.

d. The court of appeals affirmed in part and reversed and remanded in part. *Armstrong II*. The court affirmed the district court's holding that the EOP and NSC recordkeeping guidelines were inconsistent with the FRA. 1 F.3d at 1282-1287. The court rejected the government's contention that preservation of paper records of electronic mail messages was sufficient to comply with the Act. The court reasoned that, "since there are often fundamental and meaningful differences in content between the paper and electronic versions of these documents, the electronic versions do not lose their status as records and must be managed and preserved in accordance with the FRA." *Id.* at 1287.

The court also considered petitioners' contention that the EOP recordkeeping guidelines "improperly instruct NSC * * * staff to treat as presidential records materials that are, in fact, agency records subject to the FRA." 1 F.3d at 1290. The court held that those guidelines were subject to judicial review. *Id.* at 1290-1294.[3] The court concluded, however, that it could not adequately assess the guidelines on the existing record. *Id.* at 1296. The court noted in that regard that "[t]he NSC appears to have routinely conceded its status as an 'agency' subject to the FOIA in litigation regarding specific FOIA requests," but that "the issue has never been definitively resolved." *Ibid.* The court remanded the case to the district court for further proceedings.

e. After the court of appeals' decision in *Armstrong II*, the NSC reexamined its own status.[4] The

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[3] The court explained that, "although the PRA impliedly precludes judicial review of the President's decisions concerning the creation, management, and disposal of presidential records during his term of office, the courts may review guidelines outlining what is, and what is not, a 'presidential record' to ensure that materials that are not subject to the PRA are not treated as presidential records." 1 F.3d at 1294 (citation omitted).

[4] The Department of Justice's Office of Legal Counsel (OLC) also examined the issue and concluded that the NSC is not an "agency" subject to the FOIA. See Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser, National Security Council, Re: Status of NSC as an "Agency" under FOIA (OLC Sept. 20, 1993). A prior OLC opinion that had reached the opposite conclusion was withdrawn. See *id.* at 8 (withdrawing Memorandum of John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel for the President, 2 Op. O.L.C. 197 (1978)). A still earlier OLC opinion had concluded that the

Council's ultimate conclusion was that, "[t]aking into account the historical and current functions and purposes of the NSC, the NSC is an entity within the Executive Office of the President that exists solely to advise and assist the President in the discharge of his constitutionally based responsibilities over the national security affairs of the United States." Pet. App. A94. The NSC concluded on that basis that it was not an "agency" within the meaning of the relevant statutes. *Ibid.* The President instructed the NSC, however, to institute a voluntary disclosure policy for appropriate NSC records. *Id.* at A89-A90.

f. On remand from the court of appeals' decision in *Armstrong II*, the district court rejected the government's argument and held that the NSC is an "agency" subject to the FRA and the FOIA. Pet. App. A52-A88. The court determined that in several respects the Council exercises authority to act independently of the President. *Id.* at A72-A76. The court therefore concluded that, "to the extent the NSC's current guidelines allow all of its records to be classified as 'Presidential' records, the guidelines are contrary to law." *Id.* at A85.

g. The court of appeals reversed. Pet. App. A1-A51 (*Armstrong III*). The court concluded that "neither the statutory Council nor the NSC staff performs significant non-advisory functions," *id.* at A7, and that the Council therefore is not an "agency" subject to the requirements of the FRA and the FOIA.

NSC was not a FOIA agency. See Memorandum of Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, to John W. Dean, III, Counsel to the President, at 16-18 (OLC Jan. 30, 1973) (IV C.A. App. 1003-1005).

The court of appeals acknowledged that "the NSC has a structure sufficiently self-contained that the entity could exercise substantial independent authority." Pet. App. A11. The court concluded, however, that the Council does not in fact exercise such authority. The court emphasized the President's status as chair of the Council, and the National Security Advisor's control over NSC staff, as factors suggesting that the NSC lacks substantial independent authority. *Id.* at A12. The court examined the statutory provisions defining the NSC's role and concluded that Congress had not authorized the Council to perform any non-advisory function. *Ibid.* The court specifically rejected petitioners' contention that the National Security Act of 1947 places NSC staff, as opposed to the Council headed by the President, in direct control of the Central Intelligence Agency. *Id.* at A12-A13.

The court of appeals then addressed petitioners' contention that various Presidents, during the 40 years since the NSC's creation, had delegated substantial independent authority to the Council. See Pet. App. A14. The court examined each of the areas in question. See *id.* at A14-A21. The court determined that

> [i]nsofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA, or the statutory Council, the staff's functions are, of course, quintessentially advisory. Likewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own.

Id. at A14. The court concluded that "[u]nder none of these [delegations] * * * does the NSC appear to exercise any significant non-advisory function." *Id.* at A21. The court also held that the NSC's prior conduct in maintaining institutional records separate from presidential records, and in making some of the institutional records subject to public access requests, was not dispositive of the Council's status as an "agency." *Id.* at A23.

Judge Tatel dissented. Pet. App. A25-A51. In his view, "the record indicates that responsibilities delegated to the NSC are in fact carried out without the personal involvement of the President." *Id.* at A28.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. This case involves the application of established legal principles to a single component within the Executive Office of the President (EOP). The court of appeals emphasized the unique structure of the NSC as the only unit in the EOP that includes the President himself. The court also carefully considered the responsibilities of the NSC and concluded that the Council is not authorized to perform any significant non-advisory functions. The court of appeals' decision turns on the distinctive characteristics of the NSC, and it raises no issue of general importance warranting this Court's review.

1. Petitioners first contend (Pet. 17-24) that the court of appeals' decision warrants review because it has broad implications for other units within the EOP. That argument rests on a misreading of the court's opinion.

a. In *Soucie* v. *David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), the court of appeals stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." The court in *Soucie* considered the status of the Office of Science and Technology (OST), a unit in the EOP. In concluding that the OST was an agency, the Court stated that, "[i]f the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency." *Id.* at 1075.

The OST did more than advise and assist the President, the court held, because it evaluated federal science programs—a duty that *Congress* had imposed on OST's predecessor, the National Science Foundation. 448 F.2d at 1075. The court emphasized that Congress "was delegating some of its own broad power of inquiry" in order to improve the information "available to the legislature" on scientific programs. *Ibid.* Both Congress and the Executive Branch "contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President." *Ibid.* "By virtue of its independent function of evaluating federal programs," the court held, "the OST must be regarded as an agency subject to the APA and the Freedom of Information Act." *Ibid.*

The Conference Report accompanying the 1974 amendments to the FOIA endorsed the *Soucie* analysis and stated that "[t]he term [Executive Office of the President] is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise

and assist the President." H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974). This Court in *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), adopted that approach. The PRA, moreover, incorporates the *Soucie* test in the text of the Act, by defining "Presidential records" to include materials "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President." 44 U.S.C. 2201(2).

b. Petitioners do not challenge the validity of the *Soucie* test itself. They contend, however, that the court of appeals in this case applied that test in such a manner as to "potentially exempt any EOP unit from the records laws." Pet. 18. That argument is without merit.

In determining that the NSC is not an "agency" under the *Soucie* analysis, the court of appeals did not rely on attributes of the Council that are characteristic of EOP units generally. Rather, the court placed primary emphasis upon the fact that the President serves on and presides over the Council. See, *e.g.*, Pet. App. A12 (noting that "[t]he President chairs the statutory Council, and his National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff"); *id.* at A12-A13 (observing that "the statute delegates authority not to the institutional NSC but to the President and the statutory Council headed by the President"); *id.* at A20 (noting "the essential identity between the statutory Council and the President—an identity distinctive to the NSC and completely without parallel at the OST"); *id.* at A21 (noting "the overwhelming fact that the President is the head of the NSC"). The NSC is unique among

EOP components in that the President is identified by statute as a member and its head.[5] There is consequently no basis for petitioners' suggestion (see Pet. 21, 23) that the court of appeals' decision casts doubt upon the status of EOP units that have previously been determined to be "agencies."[6]

Although the court of appeals placed primary emphasis on the President's status as a member and the head of the Council, the court did not deem that factor dispositive. The court stated that, in light of the close proximity of the Council to the President, petitioners "must make a strong showing * * * regarding the" nature of the NSC's delegated authority. Pet. App. A12. It proceeded to examine in an exhaustive fashion the functions that the Council

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[5] Petitioners suggest (Pet. 23) that the Office of Administration (OA), a component of the EOP, is also headed by the President. That suggestion is incorrect. By Executive Order No. 12,122, 44 Fed. Reg. 11,197 (1979), the President has effected a broad delegation of authority over the OA to its Director. That Executive Order states that, "[s]ubject to such direction or approval as the President may provide or require, the Director shall organize the Office of Administration, contract for supplies and services, and do all other things that the President, as head of the Office of Administration, might do." *Ibid.* The OA's governing regulations state that the OA "consists of" specified offices, which do not include the President. 5 C.F.R. 2502.3(a).

[6] Petitioners thus miss the point in challenging the court of appeals' analysis on the ground that "[a]ll EOP units have proximity to the President." Pet. 19. The court of appeals made clear that the NSC is "proximate" to the President to a degree unique among EOP components because the President sits on and heads the Council. The court did not suggest that the degree of proximity to the President that is characteristic of EOP units generally is itself a basis for concluding that a particular entity is not an "agency."

performs, see *id.* at A12-A21, and concluded that petitioners "ha[d] not carried [their] burden of showing that the NSC exercises meaningful non-advisory authority," *id.* at A21.[7]

Thus, the court of appeals did not base its holding on any broad categorical rule applicable to the EOP generally. It focused instead on the distinctive characteristics of the NSC, both with respect to the Council's unique proximity to the President and with respect to the narrow parameters of its delegated authority. The court of appeals' approach in this case is in accord with its consistent practice of examining each unit within the EOP and determining, on the basis of that unit's characteristics, whether it is or is not an "agency."[8] The court's determination that the

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[7] There is no basis for petitioners' statement (Pet. 18) that the court of appeals "insisted that an EOP entity is an agency only if it has the authority to act contrary to the President's wishes." In determining whether the NSC possessed substantial authority to act "independently of the President," Pet. App. A20, or "without the consent of the President," *id.* at A17, the court of appeals focused on the extent of the Council's power to select from among alternative courses of action *without the benefit of express presidential direction.* The court observed, for example, that "[t]he question is not only whether the President sets the goal, but the generality of that goal; the more general the goal the greater the likelihood that the responsible entity is vested with some element of discretion and is not just advising or assisting the President." *Id.* at A20. See also *id.* at A9-A10 ("It is not the number of functions delegated to the NSC, but the degree of the NSC's independence in discharging them, that matters."). Obviously no EOP entity has authority to disregard a presidential directive, and the court of appeals did not suggest that such authority is a prerequisite to agency status.

[8] See *Sweetland* v. *Walters*, 60 F.3d 852, 853-855 (D.C. Cir. 1995) (staff of Executive Residence is not an agency); *Meyer* v.

NSC is not an agency can therefore be expected to have little impact on the status of other EOP units.

2. Petitioners also contend (Pet. 25-28) that the question whether the NSC is an agency is itself sufficiently important to warrant review by this Court, independent of any potential impact on other EOP units. That argument is unpersuasive.

a. The decision of the court of appeals is correct. As the court of appeals observed, "[t]he President chairs the statutory Council, and his National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff." Pet. App. A12. This Court, emphasizing its "respect for the separation of powers and the unique constitutional position of the President," has held that the President is not an "agency" subject to the APA. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992). The Court has also recognized that the National Security Advisor is not an "agency" for purposes of the FOIA. *Kissinger*, 445 U.S. at 156. Absent very persuasive evidence that the Council exercises substantial independent functions, it would therefore be anomalous to conclude that the NSC is

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Bush, 981 F.2d 1288, 1294-1298 (D.C. Cir. 1993) (task force on regulatory relief is not an agency); *National Security Archive* v. *Archivist*, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office is not a FOIA agency); *Rushforth* v. *Council of Economic Advisers*, 762 F.2d 1038, 1040-1043 (D.C. Cir. 1985) (Council of Economic Advisers is not an agency); *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1262 (D.C. Cir. 1980) (Council on Environmental Quality is an agency); *Sierra Club* v. *Andrus*, 581 F.2d 895, 901-902 (D.C. Cir. 1978) (Office of Management and Budget is an agency), rev'd on other grounds, 442 U.S. 347 (1979); *Soucie*, *supra* (Office of Science and Technology is an agency).

itself an "agency." See Pet. App. A12 ("The intimate organizational and operating relationship between the President and the NSC is * * * entitled to significantly greater weight in evaluating the NSC's arguable status as an agency than is the self-contained structure of the entity.").[9]

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[9] Contrary to petitioners' contention (Pet. 25), the court of appeals' decision in this case is not "inconsistent with this Court's ruling in *Kissinger*." The *Kissinger* opinion includes the following discussion:

> The * * * requesters have argued that since some of the telephone notes made while Kissinger was adviser to the President may have related to the National Security Council they may have been National Security Council records and therefore subject to the [FOIA]. See H.R. Rep. No. 93-876, p. 8 (1974), Source Book II, p. 128, indicating that the National Security Council is an executive agency to which the FOIA applies.

445 U.S. at 156. The passage following the citation to the House Report (quoted by petitioners, see Pet. 25) is clearly a description of the House Report, not an expression of the Court's own conclusion. Because the Court in *Kissinger* concluded that the materials at issue were not properly characterized as NSC records, a determination whether the NSC was in fact an "agency" was ultimately unnecessary to its resolution of the case. See 445 U.S. at 156.

Nor is the House Report itself persuasive authority with respect to the NSC's status. That Report stated:

> The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Plainly aware of separation of powers concerns, Congress did not confer any independent authority upon the Council. Under 50 U.S.C. 402, the NSC's functions are (i) to *advise* the President with respect to the integration of domestic, foreign, and military policies; (ii) to *coordinate* the policies and functions of the departments and agencies; (iii) to *assess and appraise* the objectives, commitments, and risks of the United States; (iv) to *consider* policies on matters of common interest to the national security departments and agencies; and (v) to *make recommendations* to the President. 50 U.S.C. 402(a), (b) and (d) (emphasis added). Those functions plainly fall within the ambit of advising and assisting the President. The legislative history of the 1947 Act confirms that the NSC is "an advisory body to the President with respect to the integration of domestic, foreign, and military policies." S. Rep. No. 239, 80th Cong., 1st Sess. 10 (1947). In particular, Congress accepted the recommendation of President Truman's advisers in the Bureau of the Budget that the Council not be "delegated authority which only the President can

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H.R. Rep. No. 876, 93d Cong., 2d Sess. 8 (1974). That catalogue reflects no analysis of the NSC's distinctive characteristics, or of the proper application of the "sole function" test. Indeed, the Council of Economic Advisers (CEA)—one of the EOP units listed in the House Report—has subsequently been held not to be a FOIA agency. See *Rushforth*, 762 F.2d at 1040 (explaining that "[w]here, as here, the specific mention of the CEA in the House Report was dropped and a specific, judicially formulated test [the *Soucie* test] was adopted by the Conference Committee for determining the FOIA status of such entities, the House Report is entitled to little weight in this respect"); *id.* at 1040-1043 (holding that the CEA is not a FOIA agency).

delegate since in the American constitutional system only the President is responsible for the ultimate formulation of foreign and military policy." IV C.A. App. 1183.[10]

In the court of appeals, petitioners' principal argument was that a series of presidential delegations had conferred substantial independent authority upon the NSC. See Pet. App. A13-A14, A21. The court of appeals examined those delegations at length. *Id.* at A14-A21. It correctly determined that

> [i]nsofar as the staff has been delegated authority to make policy recommendations for approval by the President, his NSA, or the statutory Council, the staff's functions are, of course, quintessentially advisory. Likewise, to the extent that the NSC assists the President in coordinating the activities of the various agencies with national security responsibilities, it exercises no authority of its own.

Id. at A14. "Under none of these" delegations, the court concluded, "does the NSC appear to exercise any significant non-advisory function." *Id.* at A21. Petitioners offer no basis for this Court to revisit that determination.

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[10] President Truman subsequently stated: "Even when the president sits as chairman in a meeting of the National Security Council and indicates agreement, nothing is final until the Council formally submits a document to the President. The document states that the Council met and recommended such-and-such an action, 'which met with your approval.' When the president signs this document, the recommendation then becomes a part of the policy of the government." 2 Harry S. Truman, *Memories: Years of Trial and Hope* 59-60 (1956).

b. Suits under the FOIA may be brought "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia." 5 U.S.C. 552(a)(4)(B). Because the question presented in this case may arise in the context of the Council's withholding of records requested under the FOIA, there remains the possibility of an eventual circuit conflict if a FOIA case is brought in another circuit and the court of appeals for that circuit declines to follow the D.C. Circuit's ruling in this case. In these circumstances, there is no overriding exigency that would justify this Court's review in the absence of a conflict in authority.[11]

c. Petitioners greatly overstate the practical implications of the court of appeals' ruling. Contrary to petitioners' contention, the court's decision does not "exempt[] the NSC from the records preservation and disclosure laws." Pet. 27. The Council remains subject to the requirements of the PRA, including the provisions mandating eventual release to the public of

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[11] Petitioners argue that, "[i]n the past, this Court, recognizing the District of Columbia Circuit's preeminent role in administrative law, has reviewed the Circuit's important decisions on FOIA issues despite the absence of a conflict." Pet. 24 (citing *United States Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136 (1989); *Kissinger*, *supra*). In both of those cases, however, the D.C. Circuit ordered the production of records requested under the FOIA. See *Tax Analysts*, 492 U.S. at 141; *Kissinger*, 445 U.S. at 145-146. Because suits under the FOIA may always be brought in the District of Columbia, see 5 U.S.C. 552(a)(4)(B), a D.C. Circuit decision favorable to the requester will have the practical effect of establishing a nationwide rule. The court of appeals' decision in this case, by contrast, will not preclude private plaintiffs from raising the issue presented in other courts of appeals.

presidential records following the completion of the President's service in office.[12] Consistent with separation of powers principles, Congress, in enacting the PRA, sought "to minimize outside interference with the day-to-day operations of the President and his closest advisors and to ensure executive branch control over presidential records during the President's term in office." *Armstrong I*, 924 F.2d at 290. But the court's determination that the NSC is not an "agency" does not mean that the Council's disposition of its records is legally unconstrained. Rather, the court's decision simply means that the preservation and disposition of NSC records will be governed by the statutory regime specifically designed for governmental units whose function is to "advise and assist the President." 44 U.S.C. 2201(2).[13]

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[12] Indeed, even prior to the court of appeals' decision, the bulk of the NSC's records were treated as presidential records subject to the PRA, rather than agency records subject to the FRA. See page 9, *supra*. The decision below therefore does not work a significant change in the way in which NSC records generally have been handled as a practical matter.

[13] Contrary to petitioners' contentions (Pet. 16, 26), there is no legitimate issue of destruction of records in this case. The NSC has always preserved its records, as the multitude of documents in the presidential libraries and the NSC's institutional files attest. The original dispute in this case concerned the treatment of electronic mail by units in the EOP—specifically whether the instruction to print messages that contained record information complied with the records laws. The use of electronic communications was then new to the government, and the instruction was (and remains) reasonable, at a time when most government records are maintained in paper form. In light of the court of appeals' ruling in *Armstrong II*, the Archivist has issued more comprehensive guidance to all agencies concerning how electronic mail should be handled for records preservation and disposition purposes. See

3. Finally, we believe (contrary to the court of appeals' holding in *Armstrong I*) that the APA does not provide for judicial review of a claim that a federal agency's recordkeeping practices are inconsistent with the FRA. That alternative ground for affirmance of the court of appeals' rejection of petitioners' claims under the FRA provides an additional reason for this Court to deny review.

a. Petitioners may not invoke the APA's judicial review provisions because they do not fall within the "zone of interests" protected by the FRA. To obtain APA review of administrative action, a plaintiff must show that "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); see *Bennett* v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 20.

Congress enacted the FRA's records management provisions not to benefit private parties, but to enhance the efficiency of the federal government. The FRA is a carefully crafted scheme that seeks "to ensure that a balance is struck between developing efficient and effective records management, and the substantive need for Federal records." S. Rep. No. 1326, 94th Cong., 2d Sess. 2 (1976). It reflects Congress's recognition that "[t]he measure of effective records management should be its usefulness to the executives who are responsible for accomplishing the substantive purposes of the organization." S. Rep.

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36 C.F.R. 1234.24, as amended by 60 Fed. Reg. 44,634, 44,641 (1995). The recordkeeping guidance issued by the NSC and other EOP entities in 1994 (see 877 F. Supp. at 715) is consistent with the Archivist's guidance.

No. 2140, 81st Cong., 2d Sess. 4 (1950). As this Court observed in *Kissinger*, the FRA was designed "not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole." 445 U.S. at 149.[14]

b. Review under the APA is also unavailable because a legislative intent to preclude judicial review is "fairly discernible in the statutory scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984); see 5 U.S.C. 701(a)(1). The FRA provides for judicial enforcement only through actions brought by the Attorney General to prevent or redress the "unlawful removal, defacing, alteration, or destruction of records." 44 U.S.C. 2905(a), 3106. Alleged violations of records creation and management duties, by contrast, are subject to the Archivist's limited authority to "make recommendations" for the correction of vio-

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[14] Relying upon its previous decision in *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 53 (D.C. Cir. 1983), the court of appeals in *Armstrong I* held that researchers and historians who make extensive use of government documents fall within the zone of interests of the FRA, thereby enabling them to challenge agency guidelines and directives defining what constitutes a "record." 924 F.2d at 288. That holding is incorrect. First, the court in *American Friends* improperly second-guessed this Court's holding in *Kissinger* that Congress designed the FRA solely to benefit the government. See 720 F.2d at 53. In addition, the *American Friends* court relied heavily upon a provision in the FRA requiring an agency to make and preserve records "designed to furnish the information necessary to protect the legal and financial rights of * * * persons directly affected by the agency's activities." 44 U.S.C. 3101; see 720 F.2d at 54. That Section has no application here, since petitioners have not alleged that they are "directly affected" by the NSC's activities.

lations, and to "submit a written report of the matter to the President and the Congress." 44 U.S.C. 2115(b).

"[T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Inst.*, 467 U.S. at 349. Consideration of the FRA's structure and history makes clear that Congress eschewed private lawsuits and instead "opted in favor of a system of administrative standards and enforcement." *Kissinger*, 445 U.S. at 149. Indeed, when faced with complaints that the administrative enforcement scheme was ineffective, Congress responded not by allowing for private lawsuits, but by strengthening the administrative process to allow the Archivist independently to initiate an action through the Attorney General. See H.R. Conf. Rep. No. 1124, 98th Cong., 2d Sess. 28 (1984). Allowing direct judicial intrusion into the records management process would significantly alter the scheme created by Congress, create undue delay, and disrupt agency functioning.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SCOTT ARMSTRONG, *et al.*,
Petitioners,

v.

EXECUTIVE OFFICE OF THE PRESIDENT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

For two decades following Congress's adoption of the "sole function" test in 1974, Congress, this Court, and the Executive Branch uniformly recognized that the National Security Council ("NSC") is an agency under the federal records preservation and disclosure laws. Respondents' 29-page opposition to certiorari rests on the untenable premise that the District of Columbia's ruling reversing this historical view has no legal or practical consequences. Regardless of whether the decision below is correct or not, the decision reflects an important change in the interpretation of the laws governing preservation and disclosure of government records that should be reviewed by this Court.

I.

Contrary to respondents' argument, the decision below does not reflect "application of established legal principles." Opp. at 15. The ruling below is inconsistent with this Court's conclusion that the NSC is an agency in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 156 (1980), because the Circuit Court did not apply the "sole function" test of *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), but a new, three-factor test first announced in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993). The *Meyer* test is not based on the statutory language, which explicitly provides that establishments in the EOP are agencies, without providing any exception. 5 U.S.C. § 552(f); 44 U.S.C. § 2901(14). Nor is the *Meyer* test based on legislative history. Instead, the Circuit Court has abandoned the "sole function" standard in favor of a test that significantly expands the limited exception that Congress created for units of the EOP that solely advise and assist the president. *See Meyer*, 981 F.2d at 1312 (Wald, J., dissenting); App. at A42-43 (Tatel, J., dissenting).

Nor does the decision below rest on any grounds that are "unique" to the NSC and have no consequences for other units of the EOP. The Circuit Court did not rule that, because the President is a member of the Council, it cannot be an agency. Rather, the Court found that the "proximity" factor introduced in *Meyer* required that the Court give overwhelming weight to the President's role on the Council, and the fact that the President's "National Security Adviser, working in close contact with and under the direct supervision of the President, controls the NSC staff." App. at A12.

The NSC is not unique in these respects. The President is also a member of the Office of Administration, Reorganization Plan No. 1 of 1977, 42 Fed. Reg. 56101, 91 Stat. 1633, § 2 (1977),[1] and the staff of all EOP units are controlled by Presidential advisors under the direct supervision of the President. Prior to *Meyer*, EOP units headed by personal advisors of the President — like the unit involved in *Soucie* itself — were held to be agencies despite their proximity to the President. The ruling below represents a fundamental departure from *Soucie* that casts doubt on the

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[1] Respondents' assertion that Executive Order No. 12,122, 44 Fed. Reg. 11,197 (1979), demonstrates that the President is not the head of the Office of Administration, Opp. at 18 n.5, is inaccurate. That order simply delegates to the Director of the Office of Administration responsibility to "do all other things that the President, *as head of the Office of Administration*, might do." *Id.* § 4 (italics added). Moreover, if the status of an entity like the Office of Administration turns on whether it is headed by the President, or by a Presidential advisor who reports directly to the President, the President could exempt an EOP entity performing agency functions from the federal records laws by simply issuing an executive order that makes a nominal change, naming the President as the head of the organization and charging the advisor to act at the President's direction.

status of other EOP units that, like the NSC, have long been considered "agencies" under the federal records laws.

Moreover, the Circuit Court's decision represents a sharp departure from the pre-*Meyer* law on what constitutes "independent" authority. Respondents attempt to minimize the gravity of this ruling by asserting that the majority simply concluded that "independence" requires the "power to select from among alternative courses of action *without the benefit of express presidential direction.*" Opp. at 19 n.7 (italics in original). The decision below, however, contains no such language, but if that standard is applied, the NSC has "independent" authority.

Instead, the Circuit Court maintained that, although the President has delegated authority to the NSC subcommittees and staff, such authority is not "independent" under *Meyer* unless the plaintiff proves that the authority is exercised without the consent of the President or his national security advisor. *Id.* at A17. Indeed, the majority below acknowledged that the NSC performs agency functions, but rested its ruling on the premise that the NSC did not "appear to exercise any *significant* non-advisory function" because there was no evidence that the NSC used its authority "without direct supervision by the President." App. at A21 (italics added). Under this new test for "independence," it is unclear whether any EOP unit can qualify as an agency — a result that is inconsistent with Congress's express language including the EOP in the definition of agency. *See Meyer*, 981 F.2d at 1309 (Wald, J., dissenting) (Under the majority's approach, "[o]nly renegades or freelancers who ignored or disregarded the President's orders would be seen to 'act independently.'"); App. at A35-36 (majority decision creates an "impossible hurdle") (Tatel, J., dissenting).

Finally, the Circuit Court's departure from the test endorsed in *Kissinger* deserves review, even in the absence of an inter-circuit conflict, because of the District of Columbia Circuit's unique authority over records preservation at the EOP. Respondents correctly argue that

an inter-circuit conflict is *possible* with respect to *FOIA* because a FOIA action can be brought in other circuits — although what point would be served by requiring a repetition of this lengthy dispute is unclear. Opp. at 24. But respondents do not contend that such an inter-circuit conflict is likely, nor do they contend that it is even possible with respect to the issue of whether records of the EOP are being properly preserved in accordance with the Federal Records Act. The District of Columbia courts are likely to be the only courts that would have jurisdiction to grant the type of injunctions against destruction of EOP records that were issued in this case. Thus, the Circuit Court's decision to exempt an EOP unit such as the NSC from the Federal Records Act will effectively become a national rule, unless reviewed by this Court. Access to NSC records under the FOIA is virtually meaningless if EOP records can be improperly destroyed, and judicial review to prevent such destruction is currently foreclosed by the District of Columbia's conclusion that the NSC is exempt from compliance with the Federal Records Act.

II.

Respondents also claim that exempting the NSC from the Federal Records Act is of no practical importance. Opp. at 24-25. However, there is no question that the NSC controls an enormous volume of historically important records concerning the formulation and implementation of foreign affairs, diplomatic, military, and intelligence policy. The history of this case demonstrates that the risk that records of the NSC and other EOP units may be improperly destroyed is very real; but for the injunctions entered in this action, most of the records at issue here would have been summarily destroyed by the EOP at the end of the Reagan and Bush administrations.

The ruling below, however, removes any external restraint on the NSC's ability to destroy its records in the

future. As explained in our petition, if the NSC is not subject to the Federal Records Act, the District of Columbia Circuit has held that courts lack the authority to review whether the NSC is unlawfully destroying records. *Armstrong v. Bush*, 924 F.2d 282, 289-90 (D.C. Cir. 1991). In addition, the Archivist lacks authority to recover improperly removed records, or to even inspect the NSC's records management practices. *See* Pet. at 6. The ruling below therefore jeopardizes the fate of important records, whether recorded on paper or electronic form, relating to activities such as the Iran-Contra Affair, arms control policy, and intelligence gathering. The Circuit Court's holding that such records are not protected from arbitrary destruction creates a gap in the records preservation laws that has enormous practical significance, and should not be permitted to stand without review by this Court.

III.

In the final pages of their Opposition, respondents argue that, even if the NSC is an agency, agency compliance with the Federal Records Act is not subject to judicial review. Opp. at 26-28. We do not believe that this issue is fairly included in the question presented, and respondents, who lost this issue below, have not cross-petitioned for review of this issue. In addition, if this issue is open to review by this Court, the question of whether compliance with the Presidential Records Act is subject to judicial review is also open to consideration at this stage.

Most importantly, if the lower court's holding that the Federal Records Act is judicially enforceable is open to consideration by this Court, respondents' argument does not provide a reason to deny review, but an additional reason for this Court to grant review. Respondents argue that judicial review of compliance with the Federal Records Act is inappropriate because it "would significantly alter the scheme created by Congress, create undue delay, and disrupt agency

functioning." Opp. at 28. However, this claim argues in favor of granting review because all federal agencies are now subject to precisely the judicial review respondents denounce. In 1983, the District of Columbia Circuit held that agencies and the Archivist are subject to judicial review to determine whether their decisions concerning disposal of records comply with the Federal Records Act, and that researchers have standing to bring such actions. *American Friends Service Committee v. Webster*, 720 F.2d 29, 41-45, 53-57 (D.C. Cir. 1983). In an earlier ruling in this action, the Court held that such judicial review includes the authority to review whether agency guidelines on records management comply with the Federal Records Act. *Armstrong v. Bush*, 924 F.2d at 291-94. Petitioners believe that the Circuit Court's rulings on these issues are correct, but that its ruling limiting judicial review of compliance with the Presidential Records Act is in error. *Id.* at 289-90. Respondents' attack on judicial review, however, only suggests an additional reason to grant review to resolve whether private citizens can bring actions to ensure compliance with the Federal Records Act and Presidential Records Act.

CONCLUSION

For reasons stated above, and in petitioners' petition, this Court should grant the petition to review the District of Columbia Circuit Court's ruling that the NSC is not an agency.

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